82-2131

No._____

IN THE

Supreme Court of the United States

October Term, 1982

HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARTY, JAMES STUERMER and EDWARD ZASTROW,
Petitioners,

vs.

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Is a determination of the Board of Trustees of a multi-employer/union pension fund arbitrary and capricious where the Trustees fail to provide fundamental procedural rights to the affected employees, base their decision on incorrect factual assumptions (despite efforts by one of the Trustees to explain this error to the others) and fail to notify the affected employees of the determination at a time when the same could have been acted upon by the employees?

2. Should an Appellate Court assume or guess at what action Trustees would have taken based upon correct factual assumptions, where the Trustees acted upon incorrect factual assumptions, or should the matter be remanded to the Trustees for further proceedings?

Parties to the Proceeding in the Court Below

Plaintiffs:

HAROLD MILES
EUGENE DARLAK
TIMOTHY MORIARTY
JAMES STUERMER
EDWARD ZASTROW

Defendants:

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN
ERVIN WALKER
STANLEY CLAYTON

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases:

Page

APPENDIX.

IN THE

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No. _____

HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARTY, JAMES STUERMER and EDWARD ZASTROW,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARTY, JAMES STUERMER and EDWARD ZASTROW, respectfully pray that a Writ of Certiorari issue to review the Judgment and Decision of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 20, 1983.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit from which the Petitioners seek certiorari is contained in the Appendix hereto at page 1a. The original Findings of Fact and Conclusions of Law and Order of the District Court for the Western District of New York and the final Order of the United States Court of Appeals for the Second Circuit denying Petitioners' motion for rehearing are also contained in the Appendix.

Jurisdiction

The Judgment and Decision of the United States Court of Appeals for the Second Circuit was entered on January 20, 1983. A timely motion for rehearing was made, and was denied by the United States Court of Appeals for the Second Circuit on March 29, 1983, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

Statutory Provisions

29 U.S.C. §1132(a)(1) and (g)

(a) A civil action may be brought

(1) By a participant or beneficiary

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

(g) In any action under this subchapter by a participant, beneficiary or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Statement of the Case

This action was commenced by the Petitioners, four employees and one former employee of the Continental Can Co., Inc. (Continental) pursuant to 11 U.S.C. §1132(a) of the Employee Retirement Income Security Act of 1974 (ERISA) to determine their eligibility for pension benefits from the Respondent, THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN (the Teamsters Plan), and in particular to determine their right to past service credit for years during which they were employed by Continental but for which contributions were not made to the Teamsters Plan.

Prior to July 1, 1969 the Petitioners were employed by Continental in its trucking division No. 506, operating out of Continental's Shawnee Road Plant in the City of Buffalo, New York. The Petitioner's were, at that time, represented by Local 375 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 375), and participated in a non-contributory pension plan administered by Continental (the Continental Plan). At that same time, Continental operated a separate trucking division No. 418 out of its Clay Street Plant in the Town of Tonawanda, New York (a suburb of Buffalo), as well as a third separate trucking division No. 81 out of its Colvin Avenue Plant, in the City of Buffalo, New York. The employees of trucking divisions 418 and 81 were represented by Local 449 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 449), and both groups of employees participated in the Teamsters Plan prior to July 1, 1969.

On or about July 1, 1969 Continental merged the three trucking divisions into a single and newly formed division No. 490, which replaced the three prior trucking divisions, and whose employees were represented by Local 449. Commencing as of July 1, 1969, contributions were made on behalf of the Petitioners and all of the other employees of division 490 to the Teamsters Plan, and on July 26, 1970 a pension and retirement fund stipulation (the Stipulation) effective as of July 1, 1969 was entered into between Local 449 and Continental requiring contributions by Continental to the Teamsters Fund on behalf of each of the employees in Continental's division 490 (Petitioner's Exhibit 19, a copy of which is appended hereto as part of the Appendix). Application was made by Continental to the Teamsters Plan to have the Petitioners accepted as part of the new group (Division 490), with the right to have past service credits under the terms of the Plan for prior years in the employ of Continental granted to a maximum of 20 years, after 5 years of future service credit. The application was rejected by the Plan Trustees, at least in part upon the incorrect assumption by the Trustees that the Petitioners were not a part of the newly formed division, but were rather transferred to the pre-existing division which already participated in the Teamsters Plan. The incorrect factual assumption was made despite repeated attempts by Stanley Clayton, who was one of the Trustees as well as the president of Local 375, to advise the other Trustees of their error. No independent investigation was made by or on behalf of the Trustees to verify either their own erroneous assumption or Clayton's correct version of the facts. While the determination was communicated to Continental and the President of Local 375, it was never communicated

directly to the Petitioners and none of the Petitioners became aware of the fact that they were not to receive past service credits until Petitioner MILES retired better than 6 years later.

Petitioner MILES retired effective as of January of 1976 and made application for pension funds from the Teamsters Plan commencing on January 9, 1976. On January 16, 1976, MILES received a notice from the Teamsters Plan indicating that he was not eligible for benefits due to the fact that he had only six years and five months of credit and service and that he was not credited with any service prior to July 1, 1969. This was the first time any of the Petitioners knew of or were informed that they were not going to receive past service credits for the period of time employed with Continental and as members of Teamsters Local 375 prior to September 1, 1969. The Trustees offered no explanation or reason to Miles or the other Petitioners as to why credit had not been granted for the period prior to July 1, 1969.

After a trial before the Court, the United States District Court for the Western District of New York granted Judgment to the Petitioners on their second and fifth causes of action, alleging arbitrary and capricious conduct on the part of the Trustees. The Court, *inter alia*, held that the Trustees' actions were arbitrary and capricious in that they acted upon incorrect factual assumptions despite Clayton's repeated explanations to them that the Petitioners were not being merged into a pre-existing group already participating in the Teamsters Plan, but were rather merged into a new group which had just commenced to participate in the Teamsters Plan pursuant to the Stipulation. The Court also found that

the plain language of the Plan itself required past service credits to be granted to the Petitioners and further found the conduct of the Trustees to be arbitrary and capricious in that they failed to make any investigation whatsoever into the facts, either in 1969 or in 1976, and completely failed to communicate their original decision to the Petitioners.

At trial the Teamsters Plan argued that the provisions of the Plan relating to past service credit were not applicable in that they were intended to induce new groups to participate in the Plan which would not otherwise be required to participate, whereas, they contended, the Petitioners were required to participate in the Teamsters Plan immediately upon what they *still* erroneously believed to be the Petitioner's transfer to a pre-existing division. The Teamsters Plan, however, failed to explain why a new agreement (the Stipulation) would be required whereby Continental agreed to make contributions to the Teamsters Plan on behalf of newly formed division 490 employees, and the Court below found this to be strong evidence that the interpretation offered by the Trustees was arbitrary and capricious.

On Appeal, the United States Court of Appeals for the Second Circuit reversed the Judgment in favor of Petitioners and vacated the award of attorneys fees to Petitioners' counsel. The Court changed but one of the lower Court's Findings of Fact, and determined that contributions were indeed required to be made to the Teamsters Plan on behalf of the Petitioners immediately upon their merger into newly formed division 490, due to the fact that division 490 was represented by Teamsters Local 449, which was already participating in the Teamsters Plan. The Court offered no explanation for the

existence of the Stipulation. Further, despite acknowledging the fact that the Board of Trustees of the Teamsters Plan had made its determination to deny past service credits to the Petitioners upon incorrect factual assumptions, the Court nevertheless determined that "we cannot say that [the Board's] conclusion was irrational", and further held that "the Board's misunderstanding of the facts does not appear to have effected its decision". The Court of Appeals did not address the Teamsters Plan's failure to communicate its determination to the Petitioners in a timely fashion in 1969 as it related to the issue of whether or not the Trustees acted in an arbitrary and capricious manner.

Argument

It is undisputed "black letter" law that a Court will not interfere to substitute its Judgment for that of a Board of Trustees of a Pension Fund absent a showing that the Board's determination is arbitrary and capricious. *Paris v. Profit Sharing Plan, Etc.*, 637 Fed 357 (5th Cir., 1981); *Riley v. MEBA Pension Trust*, 570 Fed 406 (2nd Cir., 1977). However, it has been held that, in making its determinations, not only must the substance of a determination of a Board of Trustees not be arbitrary and capricious, but that the procedures followed in the making and enforcing the determination must also not be arbitrary and capricious. The United States Court of Appeals for the District of Columbia, in *Saunders v. Teamsters Local 639, Employees Pension Trust*, 667 F. 2d 146 (DC Cir., 1981), held that:

> "Trustees thus are accountable for procedural fairness, and must support their factual findings by substantial evidence". 667 F. 2d 146, 148.

In that case, the Court held that the procedure employed by the trustees in implementing an amendment to the plan was arbitrary and capricious, in that the affected employees were not notified of the amendment at a time when they could have attempted to protect their interests. Similarly, the same United States Court of Appeals for the District of Columbia had previously held in the case of *Kosty v. Lewis*, 319 F. 2d 744 (DC Cir., 1963) that the limitations of fundamental fairness which are imposed upon pension plan trustees were exceeded by the failure of trustees to afford any notice or period of grace with respect to a plan amendment, so as to afford the affected employees an opportunity to protect their previously vested rights. It appears clear that the procedural fairness which trustees are required to afford to plan participants includes the obligation to examine saliently the facts of a given situation and to make reasoned decision based upon that examination. Thus, it was held, again by the Court of Appeals for the District of Columbia in the case of *Maggerd v. O'Connell*, 671 F.2d 568 (DC Cir., 1982) that:

> "Judicial intervention is required 'if the Court becomes aware, especially from a combination of danger signals, that the [Tribunal] has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision making' ". 671 F. 2d 568, 571.

It is respectfully submitted that the determination in this case made by the United States Court of Appeals for the Second Circuit is in conflict with the decisions of the United States Court of Appeals for the District of Columbia, as cited above, in that it permits a determination of the Plan Trustees denying past service credits to the Petitioners to stand, notwithstanding the

absence of any of the aspects of procedural fairness which would appear to be required of the Plan Trustees. Not only did the Trustees in the instant case fail to conduct their own investigation into any of the factual circumstances surrounding the application to have the Petitioners treated as a new group, but indeed acted upon a misapprehension of the facts despite repeated explanations by one of the Plan Trustees, as to what the actual facts were. Further, it is undisputed that there was a complete failure on the part of the Plan or its Trustees to communicate its decision to the Petitioners at any time prior to the retirement of HAROLD MILES, more than six years after the decision-making process had come to an end. Each of the Petitioners had previously accumulated substantial periods of credited time with the Continental Plan, and it would appear that had the Petitioners been promptly notified of the Trustees' decision, at least some investigation could have been undertaken as to the possibility of taking such action as would have allowed them to remain as participants in the Continental Plan. The failure of the Trustees to communicate their decision denying new group status and past service credits to the Petitioners completely denied them this opportunity. The decision of the Court of Appeals acknowledges that the decision of the Trustees was made based upon erroneous facts, that no independent investigation of the facts was ever undertaken by the Trustees and that there was no communication of the decision to the Petitioners, and nevertheless upholds the decision and the decision-making process, finding that it is not to be characterized as "arbitrary or capricious". It is submitted that this decision squarely conflicts with those of the United States Court of Appeals for the District of Columbia. It

appears that there is presently no decision of this Court providing the Circuit Courts and District Courts with guidance as to what procedural standards must be allowed by pension plan boards of trustees in the decision-making process.

Inasmuch as there would appear to be a conflict between the Second Circuit and the District of Columbia Circuit as to those procedural rights which must be afforded to plan beneficiaries by trustees in their decision-making processes and inasmuch as the issue clearly affects millions of employees who are participants in and beneficiaries of plans governed by the Employee Retirement Income Security Act of 1974, it is respectfully submitted that the issue is one that is proper for review by this Court.

Additionally, it has been held by the United States Court of Appeals for the Seventh Circuit in the case of *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir., 1980) that:

> "... As a general matter a Court should not resolve the eligibility question on the basis of evidence never presented to a pension fund's trustees but should remand to the trustees for a new determination." *Wardle, supra*, at 824.

Here, facts were presented to the trustees by Clayton but were never considered by the trustees in making their determination to deny new group status to the Petitioners. While acknowledging this error, the Second Circuit did not require a remand. Instead it proceeds to determine how the trustees would have acted had they considered the additional facts. This ruling conflicts with the decision of the Seventh Circuit in *Wardle, supra*, which conflict should be resolved by this Court.

Conclusion

For the reasons cited above, a writ of certiorari should issue to review the Decision and Judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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June 20, 1983

[1321] **APPENDIX**

Decision of the United States Court of Appeals for the Second Circuit Decided January 20, 1983

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 202—August Term, 1982
(Argued September 20, 1982 Decided January 20, 1983)
Docket No. 82-7274

HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARTY, JAMES STUERMER and EDWARD ZASTROW,

Plaintiffs-Appellees,

against

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN,

Defendant-Appellant.

ERVIN WALKER, as President of Local Union No. 449 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an Unincorporated Association, and STANLEY CLAYTON, Individually and as President of Local Union No. 375 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an Unincorporated Association,

Defendants.

Appendix—Decision of the United States Court of Appeals for the Second Circuit Decided January 20, 1983.

[1322] Before: LUMBARD, MESKILL AND CARDAMONE,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Western District of New York, John T. Elfvin, *Judge*, holding, in an action under ERISA, that the Board of Trustees of the defendant pension fund had acted arbitrarily and capriciously in denying the plaintiff employees credit under the plan for years of service during which employer contributions were not paid on their behalf, and ordering the defendant to grant the plaintiffs such credit. The district judge also awarded attorney's fees to the plaintiffs.

Judgment reversed; award of attorneys' fees vacated.

ROBERT J. FELDMAN, ESQ., Buffalo, New York (Gross, Schuman, Brizdle, Laub & Gilfillan, P.C., Buffalo, N.Y., David C. Laub, Esq., of counsel), *for Plaintiffs-Appellees.*

PETER P. PARAVATI, P.C., Utica, New York, *for Defendant-Appellant.*

[1323] LUMBARD, *Circuit Judge:*

Plaintiffs, four employees and one former employee of the Continental Can Co., Inc., commenced this action in the Western District of New York in August 1977 under

the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1976) (ERISA), to determine their eligibility for pension benefits from the defendant New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan (the Teamsters Plan). The plaintiffs, all of whom had worked for Continental for some years before Continental began to contribute to the Teamsters Plan on their behalf, sought through this action to establish their right to past service credit for years during which employer contributions were not paid. Judge Elfvin conducted a bench trial of the action from August 25th to August 28th, 1980, after which, on March 11, 1982 he ruled that the decision of the Teamsters Plan's Board of Trustees to deny the plaintiffs "new group" status, and with it, past service credit, was "arbitrary and capricious." He ordered the Teamsters Plan to grant the plaintiffs past service credit and to pay benefits accordingly. On June 7, 1982 Judge Elfvin granted the plaintiffs' post-trial motion for attorneys' fees under 29 U.S.C. § 1132(g)(1) (Supp. IV 1980). The Teamsters Plan now appeals from the judgment against it and the award of attorneys' fees. We reserve the judgment appealed from, and vacate the award of attorneys' fees.

With one exception to be noted later, the facts, for purposes of this appeal, are those found by the district court. Continental, at all relevant times, has operated three plants in the Buffalo, New York area. Prior to July 1, 1969 the plants' truck drivers were assigned to separate [1324] corporate divisions: the drivers at the Clay Street plant in Tonawanda, New York to Plant No. 418; the drivers at the Colvin Boulevard plant in Buffalo

to Plant No. 81; and the drivers at the Shawnee Road plant in North Tonawanda, New York to Plant No. 506.

The plaintiffs are five drivers who prior to July 1, 1969 were assigned to Plant No. 506 at Shawnee Road. Teamsters Union Local 449 represented the drivers at the Clay Street and Colvin Boulevard plants and Teamsters Union Local 375 represented the plaintiffs. In a letter to Local 449 dated December 11, 1967 Continental agreed to abide by the terms of the so-called "National Master Freight Agreement" (NMFA). The NMFA required Continental to contribute to the Teamsters Plan on behalf of the Local 449 drivers. Continental did not contribute to the Teamsters Plan on behalf of the plaintiffs, who instead participated in a corporate pension plan.

On July 1, 1969 Continental merged the three trucking divisions into a single Plant No. 490. The merger did not entail a physical transfer of drivers but involved only minor changes in route assignments and the introduction of a central dispatch system. Because Local 449 had a union shop agreement with Continental, the merger of the drivers into a single bargaining unit required the plaintiffs to transfer their membership from Local 375 to Local 449. Concerned that the plaintiffs would not receive past service credit under the Teamsters Plan for pre-merger employment,[1] the president of Local 375,

[1] All of the plaintiffs had worked for Continental or a predecessor corporation for a substantial number of years prior to July 1, 1969. Harold Miles began employment with Continental in March, 1953, Eugene Darlak in March, 1959, Timothy Moriarty in February, 1953, James Stuermer in January, 1957, and Edward Zastrow in December, 1948.

[1325] Stanley Clayton, asked Continental to apply to the Teamsters Plan to have the plaintiffs treated as a "new group." The new group rule is incorporated in section 3(2) of the Teamsters Plan.[2] Under the rule, an employee who joins the Teamsters Plan as part of a new group is entitled to receive credit for past service with the employer, up to a maximum of twenty years, if the employee works for the employer for another five years and the employer contributes to the Teamsters Plan on behalf of the employee for those five years. A new group is a unit of employees which commences participation in the Teamsters Plan on the same date that the relevant employer (the "Participating Employer"), first becomes obligated to and does make contributions to the Plan on

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[2] Section 3(2) provides:

> A member [of the Teamsters Plan] who becomes a member after January 1, 1954 shall be entitled to credit for service as an Employee . . . pursuant to (a) or (b) of this subsection, only for the time spent in the employ of one or more Participating Employers in contractual relations with the Union, provided on January 1, 1954, or the Applicable Effective Date, whichever shall later occur, he was an Employee of the class for whom Contributions have been made since January 1, 1954. Such service shall be credited for the following periods and the member shall have the right to designate the alternative of his choice:
>
> (a) Credit for service prior to January 1, 1954;
>
> (b) Credit for service prior to the Applicable Effective Date, as above defined.
>
> . . . if a member becomes a member on or after January 1, 1959, he shall be limited to a maximum of 20 years' credit for service as an Employee. . .

its employees' behalf. (The "Applicable Effective Date").[3] The Participating [1326] Employer need not be the corporation as a whole, but may instead be a corporate division or plant. The purpose of the rule is to encourage new bargaining units to join the Teamsters Plan.

In response to Clayton's request, Continental on September 9, 1969 sent a letter to the Teamsters Plan's Board of Trustees requesting that the plaintiff's be accepted into the plan as a new group. In the letter, Continental offered to pay five years' worth of contributions on behalf of any Local 375 driver who retired before completing five years of service under the Teamsters Plan. The letter in this respect conflicted with the new group rule, since the rule requires the employee to be *employed* under the Teamsters Plan for at least five years in order to receive past service credit.

The Board of Trustees considered Continental's letter at its September, 1969 meeting. The Board voted unanimously to treat the plaintiffs as new employees not entitled to past service credit. The Board apparently

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[3] "Participating Employer" and "Applicable Effective Date," are defined in sections 1(2) and 1(13) of the Plan:

> (2) "Participating Employer" means any person, firm, or corporation having a collective bargaining agreement with the Union which is authorized by the Board of Trustees to participate in the Plan upon appropriate action by such employer acceptable to the Board of Trustees.
>
> (13) "Applicable Effective Date" means such date after January 1, 1954 on which a Participating Employer, as herein defined, shall first become obligated to make and does make Contributions to the Fund on behalf of Employees in accordance with the provisions of the Collective Bargaining Agreement and the rules and regulations of this Fund.

believed that Continental had physically transferred the plaintiffs from their previous plant to a plant already participating in the Teamsters Plan. Clayton was a member of the Board and was present at the meeting. He attempted to explain to the other Board members that there had been no physical transfer but merely a merger of operating divisions. However, Clayton agreed that Continental's request for new group status for the plaintiffs could not be approved because of the conflict be- [1327] tween Continental's offer and the new group rule's requirement of five years actual service. Clayton told the Board that he would request Continental to provide further information on the facts of the plaintiff's case. On October 15, 1969, before receiving any additional information, the Board told Continental by letter that its application on behalf of the plaintiffs had been rejected.

In early September, 1969, an accident required one of the Local 375 drivers, Timothy Moriarty, to be hospitalized for several weeks. Moriarty applied for disability benefits from the New York State Teamsters Health and Hospital Fund. The Health and Hospital Fund and the Teamsters Plan had the same address and manager and very similar provisions. Approximately one month after his accident Moriarty began to receive benefits from the Health and Hospital Fund. Those benefits should not have been paid unless Moriarty qualified for past service credit under the new group rule of the Health and Hospital Fund.

In January, 1970, Local 449 and Continental executed a new participation agreement that required Continental

to contribute to the Teamsters Plan on behalf of employees of "Continental Can Co., Inc. #490, Clay Street, Tonawanda, N.Y." The agreement required Continental to make payments retroactive from July 1, 1969. Ervin Walker, the president of Local 449 and a defendant in this proceeding, testified that the new participation agreement must have been executed because a new group joined the plan.

At the January, 1970, meeting of the Teamsters Plan Board of Trustees, Clayton again brought the plaintiffs' situation to the attention of the Board. He argued that the plaintiffs constituted a new group and were entitled to past service credit. The Board did not take formal action [1328] on the request for new group status, but instead asked Clayton to provide a letter describing Continental's merger of its trucking operations. Clayton apparently never sent the requested letter.

Clayton again raised the matter at the Board's next meeting, held from February 26 to March 2, 1970. According to Clayton, several of the Trustees began at this meeting to understand that Continental had not physically transferred the plaintiffs. The Board, however, again took no formal action on the request for new group status, but instead tabled further review of the plaintiffs' case until it received a letter from Local 449 detailing the plaintiffs' situation. Apparently the Board did not, following the meeting, request Local 449 to send it a letter, nor was such a letter ever received. The Board did not, at any time, formally rescind its September, 1969 vote denying the plaintiffs new group status.

The Board did not again consider the plaintiffs' status until the issue was raised by the retirement of plaintiff Harold Miles on January 9, 1976. Several months prior to his retirement Miles had submitted an application for pension benefits. On January 14, 1976 the administrator of the Teamsters Plan informed Miles by letter that his application for a pension had been rejected because he had only six and one-half years credited service under the plan. The plan required fifteen years service for payment of a pension. Miles complained to Clayton that the Teamsters Plan had not granted him past service credit, Clayton raised Miles' entitlement to past service credit at several Board meetings in 1976. In response, the Board referred to the minutes of its 1969 and 1970 meetings and again concluded that the plaintiffs were not entitled to past service credit under the new group rule. Although the membership of the Board had partially changed between [1329] 1969 and 1976, the 1976 Board did not attempt to investigate the facts itself.

This action was brought on August 8, 1977 when Miles and the other drivers who belonged to Local 375 prior to July 1, 1969—Eugene Darlak, Timothy Moriarty, James Stuermer and Edward Zastrow—filed their complaint.

The plaintiffs' second amended complaint, filed on August 7, 1980, named as defendants the Teamsters Plan, Ervin Walker in his official capacity as president of Local 449, and Clayton, individually and in his official capacity as president of Local 375. The second amended complaint alleged seven causes of action, six pursuant to 29 U.S.C. § 1132(a)(1) and one under state law. The first

three causes of action were asserted by Miles against the Teamsters Plan. The next three causes of action corresponded to the first three, except that they were asserted by Darlak, Moriarty, Stuermer and Zastrow. In the first and fourth causes of action the plaintiffs alleged that they, Continental, and Locals 375 and 449 had agreed at the time of the 1969 transfer that the plaintiffs would be accepted into the Teamsters Plan as a new group and would receive past service credit. In the second and fifth causes of action the plaintiffs alleged that the Board of Trustees had acted arbitrarily and capriciously in denying them new group status. In the third and sixth causes of action the plaintiffs alleged that the Board had approved their request for new group status at a meeting held in late 1969 or early 1970. The seventh cause of action, asserted by the plaintiffs jointly against Walker in his official capacity and against Clayton personally and in his official capacity, alleged that Clayton and Locals 375 and 449 fraudulently misrepresented to the plaintiffs in 1969 that they would receive past service credit if they transferred membership from Local 375 to Local 449 and [1330] worked for five years under the plan. As relief, Miles requested the court to order the Teamsters Plan to pay him a pension on the basis of full credit or past service. The other four plaintiffs, who had not retired, requested an order granting them past service credit under the plan. All of the plaintiffs also sought compensatory and punitive damages from Walker and Clayton.

In Judge Elfvin's decision, filed March 11, 1982, he concluded that the Board of Trustees had acted

arbitrarily and capriciously in denying the plaintiffs past service credit, and he granted judgment to the plaintiffs on their second and fifth causes of action. He concluded that the plaintiffs' remaining causes of action were unsupported by the facts. On June 7, 1982, Judge Elfvin granted the plaintiffs' post-trial motion for an award of attorneys' fees under 29 U.S.C. § 1132(g)(1). The judge ruled that the relative merits of the parties' positions, the "extremely cavalier" attitude of the Board toward the plaintiffs' application for new group status, and the need to deter "callous" behavior by pension plan trustees justified an award of attorneys' fees against the Teamsters Plan. Finding that the plaintiffs' attorneys were entitled to compensation for the risk they had assumed in representing plaintiffs on a contingent fee basis, the judge increased the final award of attorneys' fees by fifty percent over the "lodestar" figure submitted by the attorneys. The Teamsters Plan appeals from the judgment for the plaintiffs and from the award of attorneys' fees.[4]

The Teamsters Plan argues that the plaintiffs' claims are barred by the statute of limitations. We disagree. As ERISA does not prescribe a limitations period for actions [1331] under § 1132, the controlling limitations period is that specified in the most nearly analogous state limitations statute. *See Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). Here, the six-year limitations period prescribed by New York's C.P.L.R. § 213 controls. *See Valle v. Joint Plumbing Indus. Bd.*, 623

[4] The plaintiffs do not appeal from the judgment granted the defendants on their first, third, fourth, sixth, and seventh causes of action.

F.2d 196, 202 n.10 (2d Cir. 1980). A plaintiff's ERISA cause of action accrues, and the six-year limitations period begins to run, "when there has been 'a repudiation by the fiduciary which is *clear* and made known to the beneficiaries.' " *Id., quoting In re Barabash*, 31 N.Y.2d 76, 80, 334 N.Y.S.2d 890, 893 (1972). *See also Kosty v. Lewis*, 319 F.2d 744, 750 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964). The Teamsters Plan argues that the plaintiffs had clear notice in 1969 that they would not be treated as a new group, and that the plaintiffs' suit is therefore barred by their failure to commence suit by 1975. Judge Elfvin, however, found that the plaintiffs did not receive clear notice that the Board repudiated their claim until the Teamsters Plan in 1976 denied Miles a pension. This finding of fact is not clearly erroneous. We therefore proceed on the basis that the plaintiffs' suit was timely filed.

The Teamsters Plan argues that Judge Elfvin, in analyzing the plaintiffs' claim, exceeded the scope of judicial review which may properly be applied to the actions of pension plan administrators. We agree. Moreover, in our view of the record, we cannot say that the Board's conduct was arbitrary and capricious.

In order to avoid excessive judicial interference with pension plan administration, the federal courts of appeals generally have applied an "arbitrary and capricious" standard of review in actions challenging the decisions of plan administrators. *See Dennard v. Richards Group, Inc.*, 681 F.2d 306, 313 & n.11 (5th Cir. 1982) and cases [1332] cited therein. We have stated that the lawful, discretionary acts of a pension committee should not be

disturbed, absent a showing of bad faith or arbitrariness. *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 915 (2d Cir. 1982). *Accord, Haeberle v. Board of Trustees of Buffalo Carpenters*, 624 F.2d 1132, 1136 n.6 (2d Cir. 1980); *Riley v. MEBA Pension Trust*, 570 F.2d 406, 410 (2d Cir. 1977); *Wyper v. Providence Washington Ins. Co.*, 533 F.2d 57, 62 (2d Cir. 1976); *Beam v. International Org. of Masters, Mates & Pilots*, 511 F.2d 975, 980 (2d Cir. 1975). Where the trustees of a plan impose a standard not required by the plan's provisions, or interpret the plan in a manner inconsistent with its plain words, or by their interpretation render some provisions of the plan superfluous, their actions may well be found to be arbitrary and capricious. *See Morgan v. Mullins*, 643 F.2d 1320, 1321, 1324 (8th Cir. 1981); *Maness v. Williams*, 513 F.2d 1264, 1267 (8th Cir. 1975). However, the limited standard or review applied in these cases does mean that the trial court should not conduct a *de novo* hearing on a rejected applicant's eligibility for benefits, *see Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), or disregard a pension committee's reasonable interpretation of plan provisions. We fear that the district judge, in reviewing the plaintiffs' claim, failed to adhere to these limitations.

The district judge analyzed the plaintiffs' claim in two steps. First he decided upon a "correct" interpretation of the new group rule. Second he considered whether the Board's failure to adopt the "correct" interpretation was arbitrary and capricious.

Appendix—Decision of the United States Court of Appeals for the Second Circuit Decided January 20, 1983.

The district judge found that under the "correct" interpretation of the new group rule the plaintiffs consti- [1333] tuted a new group. He cited four principal items of evidence as supporting his interpretation of the rule: (1) the testimony of Walker and Clayton that the plaintiffs were a new group; (2) the January, 1970 execution of a new participation agreement between Local 449 and Continental requiring Continental to make contributions to the Teamsters Plan on behalf of employees of "Continental Can Co., Inc. #490;" (3) Moriarty's receipt of benefits from the Health and Hospital Fund, which suggested that Moriarty was a new group member under the Fund's rule; and (4) the "fact," found by him, that the plaintiffs did not have to join the Teamsters Plan when they joined Local 449, but that Local 449 could instead have negotiated a separate pension agreement on their behalf. (From this latter finding the judge concluded that the plaintiffs' entry into the Teamsters Plan was consistent with the purpose of the new group rule to add new bargaining units to the plan). On the basis of this evidence the district judge found that in merging its trucking operations Continental created a new "Participating Employer," Plant No. 490, and that the plaintiffs were employed by that employer at the time it first became obligated to contribute to the Teamsters Plan, i.e., January, 1970. The judge therefore concluded that the plaintiffs were employed by the Participating Employer (Plant No. 490) at the Applicable Effective Date (January 1970), and hence were entitled to past service credit under the new group rule.

As the second step in his analysis, the district judge found that the Board had acted arbitrarily and capriciously in failing to reach the "correct" interpretation of the new group rule. The district judge found that the Board in 1969 and 1970 mistakenly believed that a transfer rather than a merger had occurred. Although in- [1334] formed by Clayton that its understanding was incorrect, the Board denied the plaintiffs' claim without further investigation. The district judge concluded that in failing to investigate the plaintiffs' situation when clearly informed that its factual assumptions were incorrect, in failing to notify either the plaintiffs or Local 449 of the 1969 vote, and in failing in 1976 to initiate a new investigation when Miles applied for a pension, the Board acted arbitrarily and capriciously.

The Board had interpreted the new group rule quite differently than did the district court. The Board apparently believed that the Participating Employer was, in general terms, the Clay Street plant, and that the Applicable Effective Date was December 11, 1967, the date on which contributions were first made on behalf of the employees belonging to the Clay Street bargaining unit (Local 449). The Board knew that the plaintiffs had joined the covered bargaining unit (Local 449) in the summer of 1969, and that Continental had not made contributions on the plaintiffs' behalf prior to that time. The Board therefore concluded that the plaintiffs were not employed by the Participating Employer at the Applicable Effective Date and hence did not qualify for new group status. We cannot say that this conclusion

was irrational. The district judge himself found that an "employee [who] becomes a member of a particular bargaining unit after the date on which the bargaining unit first participates in the Teamsters Plan . . . is not entitled to receive past service credit." Equally important, both the policy underlying the new group rule and the rule's financial implications suggest that the Board acted rationally. As the district judge found, the rule is intended to induce independent bargaining units to join the Teamsters Plan. The inducement offered is the guarantee of [1335] past service credit to the members of the independent units. The district judge found that the plaintiffs did not have to participate in the Teamsters Plan when they joined Local 449, and that Local 449 could have negotiated a separate pension agreement on their behalf. He therefore concluded that extension of new group status to the plaintiffs would have been consistent with the rule's policy. We believe, however, that the district judge's finding of fact on this issue is clearly erroneous. The clear weight of the evidence indicates that the plaintiffs were not an independent unit, but instead *had* to join the Teamsters Plan upon joining Local 449.[5] As the Board, therefore,

[5] The district judge's finding is supported only by certain testimony by Clayton. Clayton, however, later contradicted that testimony and in his clearest testimony on the point indicated that the plaintiffs' participation was mandatory. Miles, Moriarty, Stuermer, and Zastrow all testified to their understanding that they had to join the Teamsters Plan when they joined Local 449. The National Master Freight Agreement unambiguously required Continental to contribute to the Teamsters Plan on the Plaintiffs' behalf as soon as the plaintiffs joined Local 449. *See* Articles 38(1)(a) and 53(1) of the New York State Teamsters Joint Council Freight Division Local Cartage

(Footnote continued on following page)

did not need to grant the plaintiffs special treatment in order to add them to the plan, we reject the district judge's conclusion that the policy behind the rule supported the plaintiffs' application. Instead, because the plaintiffs could not freely accept or reject participation in the plan, the rule's policy was not implicated. With regard to the financial consequences of granting new group status, it must be remembered that a grant of past service credit requires the Teamsters Plan to pay benefits [1336] for which the appropriate employer contributions were never paid. It thus appears that in denying the plaintiffs new group status the Board merely declined to impair the plan's financial condition for the benefit of employees who had to participate. Where both the trustees of a pension fund and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the trustees' interpretation must be allowed to control. *Lowenstern v. International Ass'n of Machinists and Aerospace Workers*, 479 F.2d 1211, 1213 (D.C. Cir. 1973). The facts and policies discussed immediately above convince us that the Board's interpretation of the rule

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(Footnote continued from preceding page)

Supplemental Agreement for the period April 1, 1967 to March 31, 1970 (supplement to and part of the National Master Freight Agreement for the period commencing April 1, 1967). Because we are left with a "definite and firm conviction that a mistake has been committed," the fact that some evidence supports the district judge's finding does not preclude us from treating that finding as clearly erroneous. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

was rational. The district judge should not have overturned the Board's decision.[6]

Our conclusion that the Board's interpretation of the new group rule was rational, and should not be set aside, disposes of the claim that the Board's decision-making process was arbitrary and capricious. Nonetheless, we think it necessary to note our disagreement with the district judge's statement that that the Board exhibited "an extremely cavalier attitude" toward the plaintiffs. The Board's misunderstanding of the facts does not appear to have affected its decision. Although Sol Tabor, the actuarial consultant to the Teamsters Plan, testified that if two corporate divisions merge, and enter into a new bargaining agreement providing for contributions, [1337] the employees will be entitled to past service credit, it does not adequately appear that Tabor's testimony was directed to a situation where, as here, one of the merged divisions previously was participating in the plan. Instead, under the Board's interpretation of the new group rule, the new employees of a previously participating Participating Employer are not entitled to

[6] We believe, moreover, that the evidentiary support for the district judge's interpretation of the rule was not so great as the judge himself believed. As previously noted, the district judge's finding that the plaintiffs could have refused participation in the Teamsters Plan is clearly erroneous. Moreover, we would have evaluated the testimony of Walker and Clayton cognizant that both were defendants in this action and present or former union representatives of the plaintiffs. As no evidence or testimony was received to explain the operation of the Health and Hospital Fund's new group rule, we would have placed little emphasis on Moriarty's receipt of benefits from the Fund.

past service credit regardless of whether they are merged or transferred into the applicable bargaining unit. Thus Tabor testified that the plaintiffs could not have obtained past service credit by entering into employment with the previously participating Clay Street Participating Employer, but only by forming a separate bargaining unit at the Shawnee Road plant (which then would be a separate Participating Employer) and independently joining the plan. Nor do we see "cavalier" behavior in the Board's failure to initiate its own investigation into the plaintiffs' circumstances. The district judge found that "the Board demonstrated repeated willingness to receive and consider additional information concerning plaintiffs' status." Given that finding, the mere failure to initiate an investigation cannot support a charge of gross disregard of duty.[7]

We conclude, therefore, that the Board interpreted the new group rule rationally and did so with adequate regard to the duties it owed the plaintiffs. We accordingly reverse the judgment granted the plaintiffs on their second and fifth causes of action.

[1338] Our reversal of the judgment also requires that the award of attorneys' fees to the plaintiffs be set aside. Although success on the merits is not, in theory,

[7] The Board did not individually notify the plaintiffs of the September, 1969 vote denying Continental's application to have them treated as a new group. We see no reason why the Board could not have given such notice. However, the Board did communicate the vote to Continental, and the plaintiffs' union representative, Clayton, was present at and had knowledge of the vote. The Board could reasonably have believed that Clayton or Continental would inform the plaintiffs.

indispensable to an award of attorneys' fees under 29 U.S.C. § 1132(g)(1),[8] rarely will a losing party in an action such as this be entitled to fees. At least three of the five factors ordinarily considered in reviewing requests for attorneys' fees under § 1132(g)(1) are affected by success on the merits.[9] Thus, in an action brought to redress the private rights of individual applicants, "(a)n altogether sufficient support for (a) court's decision not to award attorney's fees under ERISA is that the attorney obtained no relief under that statute." *Fase v. Seafarers Welfare & Pension Plan*, 589 F.2d 112, 116 (2d Cir. 1978). In the present case, the three reasons cited by the district court to support the award of attorneys' fees—the relative merits of the parties' positions, the need to deter "callous" behavior by pension plan trustees, and the Board's "gross and deliberate indifference" to the plaintiffs' claim—no longer are valid under our view of the case.

The judgment for the plaintiffs is reversed; the award of attorneys' fees is vacated.

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[8] Section 1132(g)(1) states:

> In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to *either* party.

(Emphasis added).

[9] The five factors are: (1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5) whether the action sought to confer a common benefit on a group of pension plan participants. *Ford v. New York Central Teamsters Pension Fund*, 506 F.Supp. 180, 183 (W.D.N.Y. 1980) (Elfvin, *J.*), *aff'd.*, 642 F.2d 664 (2d Cir. 1981).

[1078] Findings of Fact, Conclusions of Law and Order of Elfvin, U.S.D.J., Dated March 11, 1982

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARTY, JAMES STUERMER, and EDWARD ZASTROW,

Plaintiffs,

vs.

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN, ERVIN WALKER, as President of Local Union No. 449 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Unincorporated Association, and STANLEY CLAYTON, Individually and as President of Local Union No. 375 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Unincorporated Association,

Defendants.

CIV. 77-432E

Plaintiffs, four employees and one former employee of Continental Can Co., Inc. ("Continental"), commenced this action under the Employee Retirement Insurance Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*,

to determine their entitlement to receive benefits from the defendant New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan ("the Teamsters Plan"). The action arises out of a consolidation or merger of operations by Continental in 1969 whereby plaintiffs were transferred from defendant Local Union No. 375 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 375") to defendant Local Union No. 449 of said International ("Local 449"). Prior to the transfer, plaintiffs had [1079] been participants in a pension plan operated by Continental, but thereafter became participants in the Teamsters Plan. Plaintiffs claim to be entitled to receive pension benefits from the Teamsters Plan based on credit for service prior to the transfer.

Plaintiffs' Second Amended Complaint, filed August 7, 1980, asserts seven causes of action. The first three causes of action are asserted against the Teamsters Plan by plaintiff Miles, who retired from Continental in 1975 and was denied benefits by the Teamsters Plan's Board of Trustees. In his first cause of action, Miles claims that he is entitled to receive a pension based on past service credits pursuant to an agreement between the parties at the time of the transfer. Miles's second cause of action asserts that the denial of his application for benefits under the Teamsters Plan was arbitrary and capricious. His third cause of action alleges that the Board of Trustees of the Teamsters Plan approved his application for benefits based on past service credit at a meeting some time in late 1969 or early 1970. The fourth, fifth and sixth causes of action are asserted by plaintiffs

Darlak, Moriarty, Stuermer and Zastrow and correspond to Miles's first, second and third causes of action, respectively, except that said four plaintiffs are still employed at Continental and seek a determination of their future rights to receive benefits from the Teamsters Plan. The seventh cause of action, asserted by all five plaintiffs, is based on alleged fraudulent [1080] misrepresentations by Local 375 and its President, defendant Clayton, and by Local 449 in connection with the transfer. Defendant Walker is sued in his capacity as President of Local 449 and Clayton is sued both personally and as President of Local 375. Clayton was also a member of the Teamsters Plan's Board of Trustees from 1965 to 1976, but is not sued in his capacity as trustee.

The case is currently pending before me for preparation of findings of fact and conclusions of law following a non-jury trial conducted from August 25, 1980 to August 28, 1980. I issued a Memorandum and Order concerning certain evidentiary motions on March 12, 1981 and directed the parties to submit proposed findings of fact and conclusions of law by April 16, 1981. After such proposals and all trial exhibits were belatedly submitted to me in July, 1981, I took the matter under advisement. Upon consideration of the evidence presented at trial and review of the parties' proposed findings of fact and conclusions of law, I conclude that plaintiffs are entitled to judgment on their second and fifth causes of action.

Miles became a member of Local 375 in 1946 and began working for Continental as a truck driver in

March, 1953.[1] He worked in such capacity until his [1081] retirement in 1975. Moriarty became a member of Local 375 in 1949. He began working for Continental as a truck driver in February, 1953 and has worked there ever since. Zastrow has been employed by Continental since 1948 but did not begin driving trucks until May, 1956, at which time he also joined Local 375. Stuermer has been working for Continental since 1951. He became a truck driver in November, 1961 and presumably joined Local 375 at that time. Darlak began working for Continental in 1959. He joined Local 375 in September, 1960 and has been a truck driver for Continental since that time. Until 1969, all of the plaintiffs worked out of Continental's plant number 506 located on Shawnee Road in North Tonawanda, N.Y. ("the Shawnee Road plant") and were represented by Local 375. Under an agreement between Local 375 and Continental, plaintiffs participated in a pension plan operated by Continental. Plaintiffs were the only drivers employed by Continental at the Shawnee Road plant.

In 1969 Continental decided to consolidate its trucking operations by merging the Shawnee Road plant with plant number 418, which was located on Clay Street in Tonawanda, N.Y. ("the Clay Street plant"), and plant number 81, which was located on Colvin Boulevard. The merger did not entail the actual physical transfer of

[1] Miles, Moriarty and Stuermer began working for the Robert Gair Company, which apparently was taken over by Continental some time in the mid or late 1950's. Their pension rights do not appear to have been affected by the takeover, however, and I have therefore utilized the date on which they began working for Robert Gair as the date of commencement of their employment with Continental.

drivers from the Shawnee Road plant to the Clay Street plant but rather involved the manner in which the Shawnee Road drivers were supervised. After the merger, drivers from the Shawnee Road plant telephoned a dispatcher at [1082] the Clay Street plant to receive their driving assignments for the following day. They also delivered shipments of waste to the Clay Street plant on their return trips, whereas prior to the merger they had returned directly to Shawnee Road. The consolidated trucking operation was denominated "plant number 490" by Continental, and the old denominations 506, 418, and 81 were apparently discarded.

Drivers at the Clay Street plant were required to belong to Local 449, which had a union shop agreement with Continental. Consequently, the merger necessitated that plaintiffs transfer their union membership from Local 375 to Local 449.[2] In a letter to Local 449 dated December 11,

[2] This transfer was required under the terms of the International Union's Constitution. Clayton, who had become president of Local 375 in 1955 and continued in such capacity until 1976, testified at trial that Local 375 could have staged a jurisdictional dispute with Local 449 concerning representation of the Shawnee Road drivers after the merger but that such a dispute would probably have been resolved in favor of Local 449. Walker, who became president of Local 449 in December 1975, also indicated at trial that Local 375 probably could not have waged a successful fight over representation of plaintiffs. Walker further testified, however, that in his opinion Local 449 probably would have avoided a jurisdictional dispute with Local 375 if it had appeared that plaintiffs would lose pension benefits by being forced to transfer their union membership. Walker's testimony in this regard is, of course, highly speculative, particularly in view of the fact that he was not President of Local 449 at the time of the merger. At any rate, the question whether plaintiffs were technically required to transfer their union membership is not crucial to my decision.

1967 (Plaintiffs' Exhibit 20), Continental had agreed to [1083] abide by the terms of the so-called "National Master Freight Agreement," which required Continental to make contributions to the Teamsters Plan on behalf of the drivers at the Clay Street plant. Thus, at the time of the merger, the Clay Street drivers had been participants in the Teamsters Plan for approximately two years.

The basis for plaintiff's claim that they are entitled to receive credit under the Teamsters Plan for time spent in the employ of Continental as members of Local 375 is the Teamsters Plan's so-called "new group rule." Under this rule, an employee who is a member of a group of employees which comes into the Teamsters Plan as a new group is entitled to receive credit for past service with the employer (up to a maximum of twenty years) if the employee continues to work for the employer for another five years and the employer makes contributions to the Teamsters Plan on behalf of the employee for those five years. However, if the employee becomes a member of a particular bargaining unit after the date on which the bargaining unit first participates in the Teamsters Plan, he is not entitled to receive past service credit. The rule is intended to encourage new bargaining units to join the Teamsters Plan. Plaintiffs claim that they are entitled to be treated as a new group within the meaning of the rule.

The new group rule is incorporated in section 3 of the Teamsters Plan, which section provides as follows:

[1084] "(2) A member [of the Teamsters Plan] who becomes a member after January 1, 1954 [the effective date of the Teamsters Plan] shall be entitled to credit for service as an Employee * * * pursuant to (a) or (b) of this subsection, only for the time spent in the employ of one or more Participating Employers in contractural relations with the Union, provided on January 1, 1954, or the Applicable Effective Date, whichever shall later occur, he was an Employee of the class for whom Contributions have been made since January 1, 1954. Such service shall be credited for the following periods and the member shall have the right to designate the alternative of his choice:

"(a) Credit for service prior to January 1, 1954.

"(b) Credit for service prior to the Applicable Effective Date * * *.

"Anything herein to the contrary notwithstanding, if a member becomes a member on or after January 1, 1959, he shall be limited to a maximum of 20 years' credit for service as an Employee * * * prior to January 1, 1954 or the Applicable Effective Date, depending on his choice as herein set forth * * *." Plaintiffs' Exhibits 1 and 2.)

Section 1 of the Teamsters Plan, which contains definitional provisions, provided in pertinent part:

"(1) 'Employee' means a person who is in a collective bargaining unit represented by the Union, who is in the employ of any one of the participating employers, and for whom the participating employer has agreed to make contributions * * *.

"(2) 'Participating Employer' means any person, firm, or corporation having a collective bargaining agreement with the Union which is authorized to participate in the Plan upon appropriate action by such employer acceptable to the Board of Trustees.

"(3) 'Union' means one of the Local Unions * * * 375 [or] 449 * * * of the International Brotherhood of Teamsters * * *.

* * * * *

[1085] "(5) 'Contributions' means the payment to the [Teamsters] Fund [*i.e.*, the Teamsters Plan] by Participating Employers of such amount or amounts as are specified in Collective Bargaining Agreements between the Union and Employers * * * or as the same may be amended from time to time.

* * * * *

"(13) 'Applicable Effective Date' means such date after January 1, 1954 on which a Participating Employer, as herein defined, shall first become obligated to make and does make Contributions to the Fund [*i.e.*, the Teamster Plan] on behalf of Employees in accordance with the provisions of the Collective Bargaining Agreement and the rules and regulations of this Fund [*i.e.*, the Teamsters Plan]." Plaintiffs' Exhibits 1 and 2.

With regard to section 3(2) of the Teamsters Plan, there is no dispute that plaintiffs became members of the Teamsters Plan after January 1, 1954 and that Continental is a participating employer in contractual relations with the union as defined in section 1(2). The controverted issue is whether on the Applicable Effective Date plaintiffs were employees of the class for whom

contributions had been made since January 1, 1954. In particular, plaintiffs and the Teamsters Plan offer conflicting interpretations of the term "Applicable Effective Date" as it is defined in section 1(13). Plaintiffs argue that the Applicable Effective Date, as applied in this action, means the date that Continental first became obligated to make contributions to the Teamsters Fund on their behalf—to wit, at the time they transferred from a Local 375 bargaining unit to a Local 449 bargaining unit. [1086] The Teamsters Plan urges that the Applicable Effective Date means the date that Continental first became obligated to make such contributions on behalf of the drivers at the Clay Street plant—*viz.*, December 11, 1967. As I noted in my Memorandum and Order entered February 25, 1980 (which denied cross-motions by plaintiffs and the Teamsters Plan for summary judgment), both interpretations of the plan are tenable. I further indicated in said Memorandum and Order that parole evidence concerning interpretation of the Teamsters Plan would be admissible because the intent and purpose of the Applicable Effective Date provision could not be ascertained from the language employed therein.

Although the sequence of events leading up to the merger is somewhat confused, it seems clear that the merger took place July 1, 1969 and that a series of meetings among Local 375, Local 449, Continental and drivers from all three plants was conducted prior thereto. Considering that the trial of this action was conducted some eleven years after the merger occurred, it is not surprising that there was conflicting testimony

concerning the dates of the merger and the meetings. For example, Miles testified that the merger occurred September 1, 1969 and Stuermer testified that it took place at the end of August. Moriarty, on the other hand, testified that the merger occurred in July or early August. Plaintiffs' Exhibit 4, a letter to the Teamsters Plan's Board of Trustees from Continental dated September 9, 1969, also [1087] suggests that the merger occurred September 1, 1969; the letter requests the Board to accept plaintiffs into the Teamsters Plan effective as of said date.

However, the most persuasive evidence concerning the date of the merger is provided by Plaintiffs' Exhibit 19, which is an agreement entitled "Pension and Retirement Fund Stipulation" executed by Local 449 and Continental January 26, 1970. The Stipulation requires Continental to make contributions to the Teamsters Plan on behalf of employees of plant number 490 as of July 1, 1969, thereby implying that the merger took effect on that date. This inference is supported by Walker's testimony, based on his appointment book for the year 1969, that he attended a meeting at the Clay Street plant among Local 449, Continental and drivers from both the Shawnee Road and Clay Street plants June 12, 1969. This meeting was held immediately prior to the merger.[3]

[3] It is clear from all of the testimony in the case that only one meeting was held which was attended by drivers from both the Shawnee Road and Clay Street plants, that this meeting was the last of the series of meetings held prior to the merger and that this meeting was held only a short while before the merger took place.

Further evidence that the merger occurred July 1 rather than September 1 is provided by Plaintiffs' Exhibit 9, a letter dated January 14, 1976 from the Administrator of the Teamsters Plan to Miles denying Miles's application for pension benefits due to lack of sufficient service. The letter states that as of January, 1976 Miles had only "6 years and 5 tenths" credit. Such credit represents the amount of time Miles worked under the Teamsters Plan following [1088] the merger. Counting backwards, six and one-half years from January, 1976 is July, 1969. Finally, there is testimony that certain union records indicate that some of the plaintiffs transferred their union membership from Local 375 to Local 449 in July, 1969.

Local 375 was first informed of the forthcoming merger in a telephone conversation between Fred Moss, a business agent for Local 375, and one Schultz, who was the supervisor of the Shawnee Road plant. During this conversation, Local 375 was told that Continental was creating a new trucking division and that it did not want to renew the collective bargaining agreement then applicable to the Shawnee Road drivers. The agreement was due to expire at the end of July, 1969. At Clayton's request, a meeting was held at the Shawnee Road plant the following day among Schultz, Moss, Clayton and one Nieman, a management representative sent by Continental to Buffalo from New York to handle the merger.[4] At the meeting, Continental informed Local 375

[4] Clayton testified that Nieman was at this meeting. Tr.Tr., Vol. III, at 58. Miles, who came into the meeting later on, testified that Nieman was not present. Tr.Tr., Vol. II, at 225. It seems probable that Clayton's testimony is correct in this regard.

in general terms that there would be a consolidation of trucking operations. [1089] The major concern of Local 375 at this meeting was the Shawnee Road drivers' seniority and the drivers' pension rights were not then discussed. Miles, who apparently had happened by or upon the meeting while it was going on, was invited to sit in and was told that the merger was going to take place. No other drivers were present at this meeting, but Clayton testified that Moriarty telephoned him following the meeting and that he, Clayton, informed Moriarty what had occurred.[5]

According to Clayton's testimony, a second meeting between Local 375 and Continental was held two days later. At this meeting, Clayton was informed that drivers from Shawnee Road would not be physically transferred to the Clay Street Plant but that they would receive driving assignments from the Clay Street plant. Clayton was also told, apparently for the first time, that drivers at the Clay Street plant were participants in the Teamsters Plan and that the Shawnee Road drivers would no longer be covered under the Continental pension plan. Clayton suggested that, in order to avoid a loss of credit for past service by the Shawnee Road drivers, Continental should apply to the Teamsters Plan to have the drivers treated as a new group. [1090] Clayton explained to Continental that employees brought into the Teamsters Plan as part of a new group would receive credit for past service with an employer, up to a

[5] Moriarty did not give specific testimony concerning this conversation, but he did testify that he spoke with Clayton "now and then" before the merger. Tr.Tr., Vol. I, at 152.

maximum of twenty years, if the employee continued to work for the employer for at least five more years and the employer made contributions on behalf of the employee for those five years. Clayton also suggested that Continental should offer to pay two years of retroactive contributions on behalf of the Shawnee Road drivers in order to place the Shawnee Road drivers in the same relative position as the Clay Street drivers.[6] Payment of retroactive contributions was not a prerequisite to treatment as a new group, but Clayton indicated that Continental might make such an offer as a gesture of "good faith." Clayton testified that, subsequent to this second meeting, Nieman telephoned him and stated that Local 449 and Continental had agreed to Clayton's proposals regarding seniority and that Continental would apply to the Teamsters Plan to have the Shawnee Road drivers treated as a new group.

Clayton also testified that, following the second meeting, he explained the five-year requirement of the new group rule to Miles.[7] Clayton further testified that Moriarty [1091] again telephoned him after this second meeting. According to Clayton, he told Moriarty that Continental would not renew its contract with Local 375 and that the Shawnee Road drivers had no alternative but to join Local 449. Clayton also stated that he told Moriarty that matters would be handled by Local 449. Tr.Tr., Vol. III, at 86.

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[6] As previously noted, in 1969 Continental had been making contributions to the Teamsters Plan on behalf of the Clay Street drivers for about two years.

[7] Apparently, Miles could not recall this conversation with Clayton, as he testified that he did not discuss the merger with Clayton until after it had occurred. Tr.Tr., Vol. II, at 165.

Subsequently, a meeting was held among Continental, Local 449, Local 375 and the Shawnee Road drivers at the Shawnee Road plant.[8] This meeting was fairly brief and provided the drivers with general information concerning the merger. The meeting was run by Bill Buckinroth, a business agent for Local 449, and was attended by the plaintiffs and by Nieman, Schultz and Moss.[9] Apparently, plaintiffs were informed that an arrangement would be worked out whereby they would not lose credit for past service under the Continental pension plan. Tr.Tr., Vol. II, at 226 (Miles's testimony); Vol. III, at 77 (Clayton's testimony).[10]

[1092] A final meeting was held at the Clay Street plant about two weeks before the merger. This meeting was also run by Buckinroth and was attended by Nieman and other Continental representatives, Walker, and the drivers from all three of the merged plants, including all of the plaintiffs.[11] No one from Local 375 attended

[8] Again, the date of this meeting is somewhat unclear. However, it occurred prior to the meeting attended by the drivers from all three plants.

[9] Stuermer, Zastrow and Darlak all testified that Walker was present at this meeting. *See*, Tr.Tr., Vol. II, at 286 and 344; Vol. III, at 28. However, Walker testified that he did not attend such a meeting, and Miles also testified that Walker was not present. *See*, Tr.Tr., Vol. II, at 254; Vol. III, at 342. I see no reason to doubt the veracity of Walker's and Miles's testimony in this regard.

[10] Because Clayton himself did not attend the meeting, his testimony is based on what Moss told him and is therefore hearsay.

[11] Miles and Stuermer testified that one Kowalski, a supervisor at the Clay Street plant, was present but that Schultz was not. Tr.Tr., Vol. II, at 228, 287. Darlak testified that Schultz did attend. Tr.Tr., Vol. III, at 29.

Stuermer also testified that Nieman was not present (Tr.Tr., Vol. II, at 287), but other testimony is to the contrary.

because, as Clayton explained, by then the merger concerned only Local 449.[12] During the meeting, plaintiffs were told that they would be covered by a collective bargaining agreement between Local 449 and Continental and that they would participate in the Teamsters Plan.

Plaintiffs' rights under the Teamsters Plan were discussed at this meeting but it is unclear whether they were expressly told that they would definitely receive credit for past service. Miles testified that plaintiffs were told by Buckinroth that they would receive "past pension rights," provided that they worked an additional five years. Tr.Tr., Vol. II, at 163-164. However, on cross-examination, Miles [1093] testified that Buckinroth stated that "everything would be taken care of," and that Nieman stated that "they [Continental and Local 449] were working it out." *Id.*, at 229-30. Miles's testimony on cross-examination indicates that no definitive arrangement concerning past credit had been made. Moriarty testified that the plaintiffs were told that they would enter the Teamsters Plan "as a group," impliedly with past service credit. Tr.Tr., Vol. I, at 145; Vol. II, at 76. Stuermer, Zastrow and Darlak also testified that Buckinroth stated that plaintiffs would receive credit or past service, provided that they worked for Continental under the Teamsters Plan an additional five years. Tr.Tr., Vol. II, at 290, 346; Vol. III, at 31. However, Stuermer's testimony on cross-examination that plaintiffs were told that their pension rights were "being

[12] Moriarty telephoned Clayton prior to the meeting and asked him to attend, but Clayton declined.

taken care of" indicates that a firm arrangement had not been made. Tr.Tr., Vol. II, at 303. Walker, who was in training to become a business agent at the time, testified that plaintiffs were told that they would be covered by the Teamsters Plan but that there was no discussion about their receipt of past service credit. Tr.Tr., Vol. III, at 340. However, I find it unlikely that there would have been no discussion concerning plaintiffs' rights to receive credit for past service. On balance, the evidence shows that plaintiffs were most likely told that some arrangement would be made (impliedly with the Teamsters Plan) for them to receive past service credit.

[1094] Notes of the meeting were taken by Walker. At some point during the meeting, Moriarty asked that the "minutes" reflect that plaintiffs would be entitled to past service credit as a new group. Moriarty also asked that he be provided with a copy of the minutes, but such a copy was never received by him. Walker testified that he gave his notes on the meeting to Buckinroth but that he could not find the notes in Buckinroth's files. Tr.Tr., Vol. III, at 344.

Moriarty and Miles appear to have been the most active of the plaintiffs with regard to past service credits inasmuch as each had over fifteen years of service under Continental's pension plan. They dealt primarily with Clayton because Clayton was a member of the Board of Trustees of the Teamsters Plan and because he was President of the local union from which they were transferring their membership. Moriarty testified that he telephoned Clayton several times prior to the merger and that he also saw Clayton at a boat race in June, 1969.

According to Moriarty, Clayton assured him that plaintiffs' rights would be protected. On cross-examination, he testified that Clayton told him that he would receive credit from the Teamsters Plan for service under the Continental pension plan. Tr.Tr., Vol. II, at 59. In general, however, Moriarty's testimony was vague, contradictory and not very credible.

Miles testified that he discussed his pension rights with Clayton after the merger had occurred. According to [1095] Miles, he saw Clayton at the union hall and Clayton told him that plaintiffs would receive a "paper" from the Board of Trustees of the Teamsters Plan indicating that they would be entitled to past service credit as a new group. Tr.Tr., Vol. II, at 165-67. No such paper was ever received by Miles or any of the other plaintiffs. Miles further testified that, in several telephone conversations, Clayton told him that plaintiffs' pension benefits were "being taken care of." Tr.Tr., Vol. II, at 205. He also testified that, at the time of the merger, he knew that the question whether plaintiffs would receive past service credit had not been resolved. Tr.Tr., Vol. II, at 202.[13]

Moriarty and Zastrow also discussed their pension benefits with Nieman. Zastrow testified that he spoke with Nieman on one occasion before the merger and that Nieman had told him that "everything was going to be

[13] Clayton testified that he spoke with Miles at Local 375's office after the last meeting prior to the transfer. According to Clayton, Miles inquired about the status of his pension rights, and he, Clayton, replied that there could be no resolution of the matter until Continental applied to the Board of Trustees to have plaintiffs treated as a new group. Tr.Tr., Vol. III, at 89-90.

taken care of." Tr.Tr., Vol. II, at 347. Moriarty testified that Nieman had informed him that there was some question whether Continental would be required to contribute a certain amount of money to the Teamsters Plan in order [1096] to have plaintiffs receive past service credit. Tr.Tr., Vol. I, at 155-56. He also testified that Nieman told him that an arrangement whereby plaintiffs would receive past service credit would be made, but that such an arrangement had not been finalized. Tr.Tr., Vol. I, at 178. Nieman apparently returned to his office in New York shortly after the merger and no longer was in Buffalo.

Sometime in September, discussions were held among the plaintiffs concerning the possibility that they might hire an attorney to clarify their pension rights.[14] The idea was initially proposed by Stuermer to Moriarty. Apparently, both felt that an attorney might be helpful in obtaining some firm indication that plaintiffs would receive past service credit. However, Miles, Darlak and Zastrow were satisfied that an arrangement would be made [1097] so that they would not lose their past

[14] There is conflicting testimony concerning the time at which these discussions were held. Stuermer, for example, testified that the discussions occurred at the end of September, whereas Zastrow testified that they occurred in August. Tr.Tr., Vol. II, at 294; Vol. III, at 13. At one point during cross-examination, Moriarty testified that the discussions had occurred in the spring of 1970. Tr.Tr., Vol. I, at 179. However, it seems clear that at least some of the discussions were held before Moriarty was injured in a boating accident in early September, 1969. Because plaintiffs discussed hiring an attorney separately, rather than as a group, the discussions may have been held throughout September.

service credit and that a lawyer was not necessary.[15] Thus, no action was taken by any of the plaintiffs to hire a lawyer until the beginning of this lawsuit.

Continental sent a letter to the Teamsters Plan's Board of Trustees September 9, 1969 requesting that plaintiffs be accepted into the plan as a new group and that they receive past service credit. Plaintiff's Exhibit 4.[16] [1098] The letter stated that, if any of the plaintiffs became eligible for and exercised retirement before five years of service under the Teamsters Plan, Continental would pay an amount of money sufficient to provide a total of five years' worth of contributions on behalf of that particular employee. In this respect, the terms of the letter were contrary to the Teamsters Plan's new

[15] Darlak testified that he didn't "want no part of no lawyers because I was completely satisfied that it was all taken care of." Tr.Tr., Vol. III, at 33. Zastrow testified that he was opposed to hiring a lawyer because he believed that the union should have handled plaintiffs' pension rights. Tr.Tr., Vol. II, at 347. Miles testified that he trusted Clayton and believed that Clayton would take care of the matter. *Id.*, at 168.

[16] Plaintiff's Exhibit 4 is an unsigned copy of the letter addressed to the Board of Trustees and reads in pertinent part as follows:

> "Please accept the following Teamster Employees of Continental Can Company, Inc. Plant 490 into the Pension Fund effective September 1, 1969.
>
> "[Darlak, Miles, Moriarty, Stuermer, Zastrow * * *]
>
> "It is agreed that should any of these men become eligible for early or regular retirement before September 1, 1974 and exercise such retirement, [Continental] shall supply an amount of money as may be necessary in order to fund a total of five years of contributions on behalf of the man. Such amount shall be the difference between five years of contributions and the amount contributed on the employee's behalf between now and the employee's retirement date. * * *

group rule, which requires the employee to be employed under the Teamsters Plan for at least five years in order to receive past service credit.

Sol Tabor, an actuarial consultant for the Board of Trustees who also handled administrative matters, presented the letter to the Board at its meeting held from September 18 to September 20, 1969. The Board rejected Continental's application to treat plaintiffs as a new group.[17] Tabor testified that the basis for [1099] this rejection was that plaintiffs had been transferred from one plant to another and that transferred employees were not entitled to new group status.[18] Clayton concurred in

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[17] The minutes of the meeting held September 18, to September 20, 1969 read in pertinent part as follows:

> "A letter dated September 9, 1969 from the Continental Can Company, Inc., Buffalo Plant, was read. The Company had transferred five employees from another Plant into the Buffalo Plant. These employees had been covered by another Pension Plan with another Union at this other Plant. The Buffalo Plant is covered by the Teamsters Contract. The company is requesting that these five persons be granted past service credit for their employment in the other Plant not covered by the Teamsters Contract, inasmuch as they would be considered as a new group entering the Buffalo Plant. After discussion, on motion made and seconded, the Trustees unanimously voted that these five employees be treated as new employees, not as a new group, and therefore not entitled to past service credit." Plaintiff's Exhibit 6.
>
> "It is understood that these men will be treated as a new group and their past service will be recognized by your Pension Fund after five years of contributions on behalf of these men. * * *"

[18] Tabor testified that his understanding at the time of Continental's application was that plaintiffs had been transferred to a new plant rather than that a new division composed of three formerly separate plants had been created. Tr.Tr., Vol. III, at 318-19.

the Board's conclusion that new group status could not be granted on the basis of the September 9th letter because the letter was contrary to the new group rule's requirement that an employee must continue to work for the employer for five years following his entry into the Teamsters Plan. Additionally, the letter did not offer to make retroactive contributions on plaintiffs' behalf as Clayton had suggested and did not sufficiently describe that there had been a [1100] merger rather than a mere transfer of employees. Clayton believed, however, that plaintiffs were entitled to be treated as a new group because they had not merely been transferred to an existing unit; rather, in Clayton's view, plaintiffs were part of an entirely new division.[19] [1101] Clayton stated this belief to the Board and also told the Board that the letter did not adequately describe the change that had

[19] Clayton testified that:

> "* * * while I could well realize that the [Teamsters Plan], under no conditions, could accept what the company was proposing insofar as the five year requirement was concerned, that, in my opinion, did not alter the fact that this was a new group.* * *
>
> "I tried to explain to the trustees again, the setup in the Buffalo area, that the people in Shawnee Road had remained at the Shawnee Road plant, the people at the 490 plant remained at the 490 plant, that no merge—physical merge had taken place outside of control. * * * I turned to Mr. Tabor, who had read the communication, and I said, '* * * If these people were still members of 375, it would be no problem here, and the mere fact that 375 was obligated to transfer them to Local 449 should make no difference. It can make no difference. It's still a new group into the [Teamsters Plan]. We're not physically involved with these people at the 490 plant. This is an entirely new division.' " Tr.Tr., Vol. III, at 96-97.

It should be noted that Clayton's reference to the existing Clay Street plant as "the 490 plant" is erroneous.

occurred. Clayton indicated to the Board that he would contact Continental to have it provide further information regarding the merger of its trucking operations. However, before any further information was obtained, a letter dated October 15, 1969 was sent to Continental informing it that its application on behalf of plaintiffs had been rejected. Plaintiffs were not formally told, either by Continental, the Teamsters Plan or the unions, that the Board had voted to reject Continental's application to treat them as a new group.

In early September, 1969 Moriarty had been injured in a boating accident which took place shortly after the merger. As a result of the accident, Moriarty was hospitalized and unable to work for several weeks. Moriarty testified that he telephoned Clayton about a month after the accident to inquire how he should go about applying for disability benefits from the New York State Teamsters Health and Hospital Fund ("the Health and Hospital Fund"). Tabor also served as consultant and in an administrative capacity for the Health and Hospital Fund, which had the same address as the Teamsters Plan. In response to Moriarty's inquiry, Clayton called Ann Stucko, who was manager of both the Teamsters Plan and the Health and Hospital Fund. According to Clayton, Stucko told him to have Moriarty mail in the appropriate application [1102] forms and that the Health and Hospital Fund would begin paying disability benefits to Moriarty. Clayton also testified that Stucko told him she could not pay Moriarty's hospital bills without Tabor's approval. Stucko told Clayton that Tabor's approval was necessary because

plaintiffs had been rejected as a new group by the Board of Trustees of the pension plan. *See*, Tr.Tr., Vol. III, at 117-19. Moriarty subsequently obtained the proper forms and mailed them to the Health and Hospital Fund, but still did not receive benefits. He apparently telephoned Clayton again, who in turn telephoned Don Wells, who was President of Local 449 at the time. Moriarty testified that he began receiving benefits (including payment of his hospital bills) about a month or six weeks after sending in the completed forms.

Moriarty testified that he had telephoned Clayton three or four times in connection with his claim for disability benefits. He also testified that he did not discuss the status of plaintiffs' pension rights with Clayton during these conversations and that Clayton never advised him that the Teamsters Plan's Board of Trustees had refused to accept plaintiffs as a new group. Tr.Tr., Vol. I, at 158-59, 161. However Clayton testified that, when Moriarty called to inquire about disability benefits, he, Clayton, informed Moriarty that the Board had in fact rejected the application which had been made by Continental on plaintiffs' behalf. Because [1103] Clayton's testimony was generally far more credible than Moriarty's, it seems likely that such a conversation did take place. However, according to Clayton, he also told Moriarty that the matter was still pending and that it would be "clarified" and "tak[en] care of." Tr.Tr., Vol. III, at 116-19, 248-49.

The October meeting of the Teamsters Plan's Board of Trustees was held after the 15th, the date of the letter to Continental informing it that the Board had rejected its

application to treat plaintiffs as a new group. It is unclear why the Board sent such a rejection letter to Continental without first obtaining additional information, as Clayton had indicated he would do. At any rate, Clayton testified that he was unable to contact Nieman before either the October or November meeting of the Board. Finally, later in November, Nieman returned Clayton's telephone calls. Clayton testified that he told Nieman that Continental's application had been rejected because its proposal concerning the five-year provision was unacceptable and because the letter did not make clear that plaintiffs had not been merely transferred. Tr.Tr., Vol. III, at 110. According to Clayton, he told Nieman to contact Tabor and clarify the matter. Clayton further testified that in December, 1969 Nieman telephoned him a second time and informed him that he, Nieman, had spoken with someone (not Tabor) at the Teamsters Plan's office and explained what had [1104] occurred at the Shawnee Road and Clay Street plants. *Id.*, at 210-11. Clayton presumed that Nieman had spoken with Stucko. Of course, Clayton's testimony concerning Nieman's statement that he, Nieman, had telephoned the Teamsters Plan is pure hearsay entitled to little or no evidentiary weight. Tabor testified that he had not received a phone call from anyone at Continental nor had he received any message of such a phone call. *Id.*, at 287.

Appendix—Findings of Fact, Conclusions of Law and Order of Elfvin, U.S.D.J., Dated March 11, 1982.

In November, 1969 Stuermer telephoned Clayton and inquired about plaintiffs' pension rights. Stuermer testified that Clayton told him that the matter had been resolved and that by Christmas he, Clayton, would send Stuermer a letter to such effect. Tr.Tr., Vol. II, at 292-93. Stuermer never received such a letter. Clayton's account of the November telephone conversation differs from Stuermer's. According to Clayton, he told Stuermer that the application to treat plaintiffs as a new group had been rejected and that he, Clayton, had been instructed to contact Nieman to resolve the matter. Clayton also testified that he told Stuermer that, if a new application were submitted to the Board of Trustees by Continental, he would have a copy sent to Stuermer. Tr.Tr., Vol. III, at 126.

At the January, 1970 meeting of the Board of Trustees,[20] Clayton again raised the question whether plaintiffs would [1105] be entitled to receive past service credits. The minutes of the meeting, held January 12th, indicate that Clayton argued that plaintiffs should have been treated as a new group and that they were entitled to past service credit. Plaintiffs' Exhibit 7. The minutes also state that, "After discussion, at the request of the Trustees, Mr. Clayton agreed to send in a letter describing the actual condition and situation." *Ibid.* Clayton and Tabor also testified that Clayton was to provide a letter setting forth the circumstances of Continental's merger of its trucking operations. Clayton testified that he did send such a letter to the Board of Trustees, but Tabor testified that such a letter was never

[20] No meeting was held in December, 1969.

received by the Board. Because no copy of such a letter was produced, it appears that Clayton failed to send it.

Clayton again raised the matter at the Board's next meeting, which was held from February 26 to March 2, 1970 in Miami Beach, Florida. Clayton testified that, although he had written a letter to the Board explaining why plaintiffs should be treated as a new group, the Board did not have the letter before it at this meeting because the letter had not been brought to Florida. Tr.Tr., Vol. III, at 130. Clayton testified that, at this meeting, several of the trustees began to understand his argument that Continental had really only set up a central dispatch system, that plaintiffs had not actually been transferred to the Clay Street plant and that plaintiffs were indeed [1106] a new group. *Id.*, at 138. He further testified, however, that, at the suggestion of William Mosley, an employer trustee, the Board requested a letter from Local 449 confirming the facts that had been outlined by Clayton. *Id.*, at 131-32. The basis for Mosley's suggestion was that plaintiffs were then members of Local 449. According to Clayton, the Teamsters Plan's office was to contact Local 449 to request Local 449 to submit such a letter. However, it does not appear that any request for information concerning plaintiffs' status was ever made to Local 449, nor was any such written information received by the Teamsters Plan.

The minutes of the February-March meeting of the Board of Trustees state that:

> "The Trustees again discussed the inclusion in the Pension Fund of a group of employees of

> Continental Can Company who had been transferred from one plant to another. See Minutes of September 18-20, 1969 and January 12, 1970. Since these employees were formerly members of Local 449 and were now members of Local 375, the Trustees tabled further review pending receipt of a letter from Local 449 describing the circumstances in this matter." Plaintiffs' Exhibit 8.[21]

It appears that the Board's meetings were run informally, and that technically there was no pending motion which [1107] was "tabled." Tabor testified that the Board was willing to receive and consider new information concerning plaintiffs' status, and that in doing so it was acting out of "courtesy" to Clayton. He further testified that the Board never formally altered its position, taken at the September meeting, that plaintiffs were not a new group. *See*, Tr.Tr., Vol. III, at 279-83.

In March, 1970 certain negotiations involving the Teamsters were held in Washington, D.C. The negotiations were attended by Clayton, Mosley and Wells, among others. Clayton testified that, at the end of a negotiating session, he was seated in a hotel lobby with Mosley and Wells. According to Clayton, he suggested that, inasmuch as the Board of Trustees had indicated a desire to receive further information concerning plaintiffs from Local 449, Wells could explain the matter to Mosley. Clayton testified that Wells did in fact explain that there had been no physical transfer of plaintiffs from one plant to another, that upon such explanation Mosley agreed with Clayton that plaintiffs were indeed a new group, and that Mosley stated that he would take care of the matter. Tr.Tr., Vol. III, at 134-35.

[21] The minutes' statement that plaintiffs "were formerly members of Local 449 and were now members of Local 375" is erroneous.

Neither Mosley nor Clayton raised the matter at the next meeting of the Board. However, Clayton testified that he believed that Mosley could have arranged with Tabor to have plaintiffs treated as a new group and that no formal action by the Board was necessary. Tr.Tr., [1108] Vol. III, at 136, 255. Thus, Clayton thought that the matter had been finally resolved. Tabor testified that he did have authority to grant applications for treatment of employees as a new group, if he felt the application was routine. *Id.*, at 295, 308. However, Tabor also testified that he did not discuss Continental's application to treat plaintiffs as a new group with Mosley at any time after the Board's February-March meeting. *Id.*, at 301. The Board took no further action on Continental's application, nor was any discussion held with respect thereto, until Miles retired in 1976.

Clayton had no further conversations with any of the plaintiffs concerning their pension rights until 1976. However, Walker testified that in January, 1971 he and Buckinroth attended a meeting concerning certain operational problems at the Shawnee Road plant. According to Walker, Moriarty asked Buckinroth about plaintiffs' pension rights. Walker testified that Buckinroth replied that he didn't know about the status of plaintiffs' pensions and that he would have to "check it." Tr.Tr., Vol. III, at 343; Vol. IV, at 29-30.

Miles retired from Continental January 9, 1976. He had submitted an application for pension benefits to the Teamsters Plan several months prior to his retirement. Mosley, who by then had become Administrator of the

Teamsters Plan, sent a letter to Miles dated January 14, 1976 indicating that Miles was not eligible to receive [1109] a pension from the Teamsters Plan. Plaintiff's Exhibit 9. Mosley's letter states in part that "you [Miles] only have credit for the years 1969 through 1975, giving you a total of 6 years and 5 tenths. This is less than the 15 years required by the Plan." Miles testified that he thereupon telephoned Walker, who had just become President of Local 449 in December, 1975, but Walker told Miles that the pension arrangements had been "Mr. Clayton's deal." Tr.Tr., Vol. II, at 176.[22] Miles also testified that he contacted Clayton in April, 1976. Clayton was still a member of the Teamsters Plan's Board of Trustees at that time. Apparently, he had already learned from Local 375 that Miles's application had been rejected,[23] and had sent a letter to Continental requesting its assistance. Plaintiff's Exhibit 11.[24] Miles testified that Clayton [1110] told him that he, Clayton, "would see what he could do." Tr.Tr., Vol. II, at 250.

Clayton testified that he requested the Board of Trustees to resolve Miles's application at three separate meetings in 1976. However, a number of trustees who

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[22] Walker did not give any testimony concerning conversations with Miles following Miles's rejection.

[23] Clayton testified that he had learned that Miles's application for a pension had been rejected in March, 1976 while he was in Florida. Tr.Tr., Vol. III, at 143.

[24] Plaintiffs' Exhibit 11 is a letter dated March 5, 1976 addressed to Continental and bears the signature "Stanley Clayton." Clayton testified that the signature was not his and that he did not recall writing this letter. However, it seems likely that the letter was dictated by Clayton and signed in his name by his secretary. *See*, Tr.Tr., Vol. III, at 144-146.

were members of the Board in 1969 and 1970 when the matter had been handled initially were no longer on the Board and had been replaced by new trustees. According to Clayton, the Board merely referred back to the minutes of its September, 1969 meeting and therefore concluded that plaintiffs were not entitled to be treated as a new group. Tr.Tr., Vol. III, at 152, 237-38. Although Clayton testified that he could not remember whether the Board also referred to the minutes of the meetings held in January and February-March, 1970, he also testified that in 1976 he explained to the Board that the matter had been discussed in 1969 and 1970 for several months. *Ibid.* Tabor was still an actuarial consultant for the Board in 1976 and presumably would have been present at the meetings in which Miles's application was discussed. However, Tabor did not testify concerning events occurring after Miles had retired.

Clayton also discussed the matter with Mosley after Miles's application had been rejected. According to Clayton, Mosley stated that he could not remember any of the details concerning the arrangements that had been made in 1969 and 1970. Tr.Tr., Vol. III, at 150. Clayton [1111] further testified that Mosley subsequently contacted him and said that he had only been able to locate the minutes from the Board's meetings in September, 1969 and January and February-March, 1970 but that, if Clayton could obtain any other information, he would handle the matter. *Ibid.* Clayton testified that he replied to Mosley that he could not provide any further information. *Ibid.* Apparently, Clayton also sent

a second letter dated May 7, 1976 to Continental requesting that it contact Mosley. Plaintiff's Exhibit 12.[25]

The Board took no further action with respect to Miles's pension application. Moreover, the Board did not attempt to obtain any information (other than what was reflected in its own minutes for the years 1969 and 1970) relating to whether plaintiffs should be treated as a new group at any time after Miles's retirement. Miles was eventually granted a pension by Continental but this grant does not appear to affect his rights with respect to the Teamsters Plan. *See*, Plaintiffs' Exhibit 10. He testified that he would have received a pension of approximately $511 per month if his application for benefits based on service credit had been granted by the Teamsters Plan. Tr.Tr., Vol. II, at 181. The Teamsters Plan has not disputed the amount of the pension [1112] to which Miles would be entitled.

Subject Matter Jurisdiction

Section 502(a) of ERISA provides that "[a] civil action may be brought— (1) by a participant or beneficiary— * * * (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan * * *." 29 U.S.C. §1132(a). Federal district courts are granted jurisdiction over actions pursuant to section 502(a) by section 502(e) of ERISA. 29 U.S.C. §1132(e)(1). The Teamsters Plan is a proper defendant under section 502(d)(1) of ERISA. 29 U.S.C.

[25] This letter also appears to have been dictated by Clayton and signed in his name by his secretary. *See* note 24, *supra*.

§1132(d)(1). Defendants argue that I lack subject matter jurisdiction over this action because plaintiffs' claims under section 1132(a) arose prior to January 1, 1975, the effective date of said section.[26] Thus, defendants argue that plaintiffs have failed to state any claim for [1113] relief under section 1132 and that I may not exercise pendent jurisdiction over plaintiffs' fraud claims. Of course, plaintiffs bear the burden of establishing that I may exercise jurisdiction over this action.[27]

It is generally held that a cause of action under ERISA accrues at the time the trustees of a pension plan deny an application for benefits and that ERISA is applicable to a cause of action based on a denial of benefits which occurs after ERISA's effective date. *Paris* v. *Profit Sharing Plan, Etc.*, 637 F.2d 357, 361 (5th Cir.) *cert. denied*, ____U.S.____, 102 S.Ct. 140 (1981); *Reiherzer* v. *Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978); *Oates* v.

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[26] As noted in my Memorandum and Order entered June 14, 1979, at 2, n.2, there is a split of authority whether section 1132(a) is effective as of the date of ERISA's enactment (September 2, 1974) or as of the date provided by section 514 of ERISA, 29 U.S.C. §1144 (January 1, 1975). In the present case, the parties have agreed that the effective date of section 1132 is January 1, 1975. Moreover, as I also noted in my June 14, 1979 Memorandum and Order, plaintiffs' claims either arose in 1969-70 or in 1975-76 when Miles's application for a pension was rejected. Thus, I am not confronted with the question whether the effective date of section 1132 is January 1, 1975 or September 2, 1974.

[27] In my Memorandum and Order filed February 25, 1980, I concluded that plaintiffs had at least made a sufficient showing of jurisdiction to withstand defendants' motion for summary judgment. However, I also noted that my determination at that time did not preclude a dismissal based on lack of jurisdiction after trial had been held. Memorandum and Order filed February 25, 1980, at 10, n. 5.

Teamsters Affiliates Pension, 482 F.Supp. 481, 484, n.7 (D.D.C. 1979); *Morgan* v. *Laborers Pension Trust Fund for N.Cal.*, 433 F.Supp. 518, 522-23 (N.D. Cal. 1977). This holding is premised on the notion that a claim against a trustee based on a denial of benefits does not accrue until there has been "a clear and continuing repudiation of the right to trust benefits." *Kosty* v. [1114] *Lewis*, 319 F.2d 744, 750 (D.C.Cir. 1963), *cert. denied*, 375 U.S. 964 (1964). *See, Morgan* v. *Laborers Pension Trust Fund for N.Cal., supra*, at 523. In the present case, Miles's application was denied by the Teamsters Plan's trustees in January, 1976—a full year after the effective date of ERISA. Nevertheless, defendants agrue that the denial of Miles's application was based on events occurring in 1969 and 1970. However, I find that there was no "clear and continuing repudiation" of plaintiffs' rights to receive pension benefits based on past service credit until Miles's application for benefits was rejected.

The only formal action taken by the Board with regard to plaintiffs' pension rights in 1969 and 1970 was, of course, its rejection of Continental's application to treat them as a new group at its September, 1969 meeting. However, because the Board's meetings were run in an informal manner, I do not place significant weight on the fact that the Board voted to reject the application. Rather, the Board's entire course of conduct in 1969 and 1970 is far more probative on the question whether plaintiffs' entitlement to receive past service credit was clearly repudiated.

At the September, 1969 meeting of the Board, Clayton indicated his view that plaintiffs were in fact a new group and offered to obtain additional information for the Board. At the Board's meeting in January, 1970, Clayton again argued that plaintiffs should be treated [1115] as a new group. Clayton agreed, *at the Board's request*, to send a letter describing the situation in greater detail. Finally, at the February-March meeting, Clayton persuaded a number of trustees that plaintiffs were in fact a new group. In order to confirm the information which had been orally provided by Clayton, the Board requested that Local 449 send it a letter. Thus, the Board demonstrated repeated willingness to receive and consider additional information concerning plaintiffs' status. Moreover, the Board's own minutes for the February-March meeting state that "the Trustees tabled further review pending receipt of a letter from Local 449 * * *." The minutes clearly indicate that plaintiffs' status was still under consideration and that further consideration of the matter was contemplated by the Board. Tabor testified that the Board would not have actually re-opened its decision not to grant plaintiffs new group status unless a letter had been received. *See*, Tr.Tr., Vol. III, at 316-18. This testimony suggests that there was no formal reconsideration or re-opening of the Board's decision in the absence of a letter. However, Tabor's testimony does not imply or suggest that the Board's decision was final in the sense that it could not be reversed or that the Board was not actually considering plaintiffs' status in light of Clayton's arguments. Regardless of any formal and technical re-

opening of the decision to deny new group status to plaintiffs, the Board was in actuality still [1116] considering plaintiffs' status even after it had voted in September, 1969 not to treat them as a new group. Viewed in its entirety, the Board's conduct demonstrates that it had not clearly repudiated plaintiffs' entitlement to be treated as a new group under the Teamsters Plan.

It is also significant that in 1969 and 1970 plaintiffs were never told in unambiguous terms that they would not be treated as a new group. Clayton testified that he informed both Moriarty and Stuermer that in its September, 1969 meeting the Board of Trustees had rejected Continental's application to accord new group status. Moriarty denied that such a conversation with Clayton had occurred, but his testimony was not credible. Stuermer also denied that Clayton told him that Continental's application had been rejected, but it seems probable that he merely misunderstood Clayton.[28] However, according to Clayton's own testimony, Clayton assured both Moriarty and Stuermer that the matter was still pending before the Board and that plaintiffs' rights to past service credits would [1117] be resolved. None of the other plaintiffs was ever informed that the Board had rejected Continental's application to treat them as a new group. Certainly, the Board itself took no action to

[28] It seems clear that Clayton was attempting to assure Stuermer that plaintiffs' past pension credits would not be forfeited. Thus, Clayton probably told Stuermer that there had been a rejection but that Continental was going to submit another application to the Board. When Clayton stated that he would send a copy thereof to Stuermer, Stuermer most likely believed that Clayton meant he would send a "letter" resolving the matter completely.

so notify plaintiffs. Because plaintiffs were not told plainly and unambiguously that they would not be treated as a new group and/or that they would not receive past service credit, there was no clear and continuing repudiation of plaintiffs' rights to receive past service credit until Miles's application for pension benefits was denied in 1976.[29]

Application of ERISA to the claims set forth by plaintiffs in this action is not inconsistent with section 514(b)(1) of ERISA, which states that "[t]his section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. §1144(b)(1). Plaintiffs' first six causes of action are all based on or arise out of the repudiation of their right to receive past service credits but such repudiation was not clearly accomplished until 1976. A claim based on a denial of [1118] pension benefits after January 1, 1975 states a cause of action under ERISA, even though the claim may also involve or stem from conduct or action which occurred prior to said date. *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981). *See also, Fulk* v. *Bagley*, 88 F.R.D. 153, 160 (M.D.N.C. 1980).

Thus, I conclude that plaintiffs have stated claims for relief under ERISA which are within my jurisdiction. I also conclude that I may exercise pendent jurisdiction

[29] In this regard, it is irrelevant that plaintiffs never contacted the Teamsters Plan in order to inquire whether they were eligible for past service credit. For purposes of determining the applicability of ERISA, the pertinent issue is whether plaintiffs' rights to receive benefits were clearly and continuously repudiated prior to ERISA's effective date. No such repudiation occurred until 1976. Moreover, plaintiffs' reliance on information received from Clayton was entirely reasonable, inasmuch as Clayton was the President of their former local union as well as a member of the Board of Trustees.

over plaintiffs' common law fraud claim. *Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Statute of Limitations

The Teamsters Plan has also raised a defense that plaintiffs' claims under ERISA are barred by the appropriate statute of limitations. Because ERISA does not expressly prescribe a limitations period for actions under section 1132,[30] I must look to the most clearly

[30] The Teamsters Plan has suggested that plaintiffs' claims are untimely under section 413 of ERISA, which provides:

> "No action may be commenced under this subchapter [29 U.S.C. §§1001-1144] with respect to a fiduciary's breach of any responsibility, or obligation under this part [29 U.S.C. §§1101-1114], or with repect to a violation of this part after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this subchapter * * *." 29 U.S.C. §1113.

This is an action "to recover benefits due to [plaintiffs]" under the Teamsters Plan pursuant to 29 U.S.C. §§1132(a)(1)(B) rather then an action "with respect to a fiduciary's breach of any responsibility, duty or obligation" under 29 U.S.C. §§1101-1114. Thus, by its own terms, section 413 is inapplicable in the current action.

Moreover, even if section 413 is applicable herein, both the six-year period set out in section 413(1) and the three-year period set out in section 413(2) must be measured from the denial of Miles's application in 1976. Under either subsection, plaintiffs' claims are timely.

analogous [1119] state statute of limitations. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975).

Section 213 of New York's Civil Practice Law and Rules ("CPLR") provides that:

> "The following actions must be commenced within six years:
>
> 1. an action for which no limitation is specifically prescribed by law;
>
> 2. an action upon a contractural obligation or liability express or implied * * *."

The Teamsters Plan concedes that section 213 provides the state statute of limitations most analogous to an action [1120] under ERISA but points out that the limitations period must be measured from the time the cause of action accrued. CPLR §203(a). As previously discussed, plaintiffs' claims under ERISA did not accrue until Miles's application was denied in 1976. Because the initial Complaint in this action was filed in 1977, plaintiffs' claims under ERISA are timely.

Plaintiffs' Second and Fifth Causes of Action

The captioned causes of action allege that the Teamsters Plan's refusal to grant them credit for service in the employ of Continental prior to 1969 is arbitrary and capricious. It is clear that, if plaintiffs are deemed to be a new group as that term is applied under the Teamster's Plan, they are entitled to past service

credit.[31] Thus, the only question presented with regard to these causes of action is whether plaintiffs were a new group at the time they began participating in the Teamsters Plan. The same basic question can be framed as whether the "Applicable Effective Date" is the time at which the consolidated trucking division was created, as plaintiffs contend, or some other date prior thereto.

The Board's decision that plaintiffs are not entitled to be treated as a new group must be accorded substantial [1121] deference;[32] plaintiffs may succeed on causes of

[31] The Teamsters Plan does not dispute that plaintiffs have continued in the employ of Continental for at least five years following their participation in the plan, as required by the new group rule.

[32] Defendants' Exhibits 1 and 2, which were received at trial, are the Teamsters Plan's Trust Indenture as adopted January 1, 1954 and as amended through January 1, 1976. Counsel were instructed to retain exhibits during the course of the trial and to submit their exhibits to the court along with their proposed findings of fact and conclusions of law. In a letter to me dated July 15, 1981, Peter P. Paravati, counsel for the Teamsters Plan, has indicated that he does not have the original copies of the Trust Indenture that were received in evidence. He has therefore provided "replacement" copies of the exhibits "in the event that [the originals] are not found." However, Paravati has not obtained the other parties' consent by stipulation to my receipt of these documents in place of the original exhibits. Moreover, his letter does not indicate (by means of the notation "cc") that counsel for the other parties were sent copies of the letter or that he has notified counsel in some other fashion that he has submitted documents that were not received in evidence.

It appears, however, that Paravati's failure to submit the original exhibits and/or to obtain the other parties' consent to my receipt of "replacements" is insignificant from an evidentiary point of view. The Teamsters Plan apparently relies on exhibits 1 and 2 only to show that the Board of Trustees has discretion to interpret the terms of the plan. Plaintiffs do not deny that the Board has such discretion, but allege that the Board has exercised its discretion in an arbitrary and capricious fashion.

action two and five only upon a showing that the Board's decision is arbitrary and capricious. *Peckham* v. *Board of Trustees, Etc.*, 653 F.2d 424, 426 (10th Cir. 1981); *Paris* v. *Profit Sharing Plan, Etc., supra*, at 362; *Riley* v. *MEBA Pension Trust*, 570 F.2d 406, 410 (2d Cir. 1977); *Morgan* v. *Laborers Pension Trust Fund for N.Cal., supra*, at 524. An act is said to be arbitrary and capricious if it is done "without [1122] adequate determining principle or * * * reason or judgment." *First National Bank of Fayetteville* v. *Smith*, 365 F.Supp. 898, 903 (W.D.Ark. 1973), rev'd on other grounds, 508 F.2d 1371 (8th Cir. 1974), *cert. denied* 421 U.S. 930 (1975). *See also, Danti* v. *Lewis*, 312 F.2d 345, 348 (D.C.Cir. 1962).

Viewed in its entirety, the evidence in the case clearly demonstrates that plaintiffs comprised a new group as that term is applied with respect to the Teamsters Plan. Indeed, the evidence that plaintiffs were such within the meaning of the plan is almost overwhelming. Both Clayton and Walker testified that, in their respective opinions, plaintiffs were entitled to be treated as a new group. *See, e.g.*, Tr.Tr., Vol. III, at 187-90 (Clayton); Vol. IV, at 35 (Walker). Clayton's testimony in this regard was particularly emphatic. Moreover, his opinion is entitled to considerable weight because of his position as a member of the Teamsters Plan's Board of Trustees for some ten years.

Clayton's and Walker's opinions are supported a substantial amount of circumstantial evidence. In January, 1970, Local 449 and Continental executed a new participation agreement requiring Continental to make contributions to the Teamsters Plan on behalf of

employees of "Continental Can Co., Inc. #490, Clay St., Tonawanda, N.Y." (Plaintiffs' Exhibit 19.) The new agreement was signed by Buckinroth on behalf of Local 449 and the Teamsters [1123] Plan and by Continental. According to Walker's testimony, the only reason that such a participation agreement would have been executed was that a new group of employees had been taken into the plan. Tr.Tr., Vol. IV, at 27-28.

As noted *supra*, Moriarty received benefits from the Teamsters Health and Hospital Fund in connection with the injuries he sustained in September, 1969. Under the Teamsters' health plan, a new employee coming into the plan is not eligible to receive health benefits in a particular calendar quarter unless he has had contributions made on his behalf to the Health and Hospital Fund for 36 days in the previous quarter. *See*, Tr.Tr., Vol III, at 217-18, 333. On the other hand, an employee coming into the Teamsters' Health and Hospital Fund as a member of a new group receives immediate coverage as long as he has been employed by the company for a particular amount of time. *Ibid.* According to Clayton, if Moriarty had been a new employee rather than a member of a new group under the Health and Hospital Fund, he would not have been eligible to receive hospitalization benefits in September, 1969. Tr.Tr., Vol. III, at 228. Thus, the fact that Moriarty did receive benefits demonstrates that he was treated as a member of a new group under the Health and Hospital Fund.[33] Such treatment by the

[33] Tabor also testified that one "might assume" that plaintiffs had been treated as a new group by the Health and Hospital Fund. Tr.Tr., Vol. III, at 333-34.

Health and [1124] Hospital Fund implies that plaintiffs were also a new group for purpose of the Teamsters Plan. While such an inference is by no means compelled, it is reasonable based on the close identity between the two plans. Both were administered at the same office in Utica by Tabor and Stucko. Certainly, there is no indication that the new group rule was or is to be applied differently under the two.

It is also significant that, although plaintiffs were required to join Local 449 after the merger, Local 449 was not required to bring plaintiffs into the Teamsters Plan. For example, Clayton testified that Local 449 could have negotiated a separate pension agreement with Continental on behalf of plaintiffs. Tr.Tr., Vol. III, at 168, 187, 197-98. The fact that plaintiffs were not strictly required to join the Teamsters Plan but that some other pension agreement could have been reached on their behalf strongly suggests that plaintiffs were a new group under the Teamsters Plan. Moreover, the intent of the new group rule is to encourage additional bargaining units to join the Teamsters Plan; this aim was clearly furthered by plaintiffs' entry into the Teamsters Plan.

Tabor's testimony provides the only significant evidence that plaintiffs were not entitled to new group status. *See, e.g.*, Tr.Tr., Vol. III, at 292-93. According to him, the crucial factor for determining plaintiffs' entitlement to such status was whether the Continental [1125] unit by which they were employed first became a "participating employer" in the Teamsters Plan at the

time plaintiffs joined the Teamsters Plan.[34] *Id.*, at 300. According to Tabor, one Continental plant might be a "participating employer" whereas another Continental plant might not. *Ibid.* Tabor's testimony suggests that the Clay Street plant was a "participating employer" within the meaning of Section 1 of the Teamsters Plan prior to the merger and that, because plaintiffs were transferred into the Clay Street plant, they were not entitled to be treated as a new group.

However, Tabor's testimony is clearly based on the erroneous assumption that plaintiffs were merely transferred to the Clay Street plant. For example, he testified that at the time of the merger, he had believed that plaintiffs had been transferred from one plant to another, not that a merger of several plants had occurred. Tr.Tr., Vol. III, at 318-19. The consolidation of Continental's trucking operations did not, however, entail the transfer of plaintiffs to the Clay Street plant. The evidence conclusively demonstrates that Continental in fact created an altogether new division denominated plant number 490 and [1126] composed of drivers from three formerly separate plants. This new division was a Participating Employer within the meaning of section 1; otherwise, there would have been no basis or reason for the execution of Plaintiffs' Exhibit 19. Thus, plaintiffs were not merely transferred into an existing Participating Employer. Rather, at the time Continental consolidated its truck operations plaintiffs became

[34] Section 1(13) of the Teamsters Plan defines the term "Applicable Effective Date" as the date "*on which a Participating Employer*, as herein defined, shall first become obligated to make and does make contributions to the [Teamsters Plan] * * *."

employed by a totally new Participating Employer—i.e., plant number 490. Because plaintiffs were employed in plant number 490 at the time it first became obligated to make contributions to the Teamsters Plan (upon the execution of Plaintiff's Exhibit 19 in January, 1970), they are entitled to be treated as a new group. Tabor himself conceded that, if Continental had in fact merged two formerly separate divisions and if the new division had entered into a collective bargaining agreement requiring it to make contributions to the Teamsters Plan on behalf of its employees, the employees would be entitled to receive credit for past service. Tr.Tr., Vol. III, at 334-35.

Plaintiffs have also demonstrated that the Board's decision not to treat them as a new group was arbitrary and capricious. Clearly, the Board's decision was based on an erroneous belief that plaintiffs had been transferred to the Clay Street plant. This mistaken belief is demonstrated by Tabor's testimony as well as the Board's own minutes. *See*, Plaintiffs' Exhibit 6 ("The Company [Continental] [1127] had *transferred* five employees from another plant into the Buffalo plant.") Continental's letter dated September 9, 1969 to the Board (Plaintiffs' Exhibit 4) does not adequately describe the merger that had occurred. However, neither does the letter indicate that plaintiffs were simply transferred from one plant to another; indeed, the word "transfer" appears nowhere in the text of the letter. More importantly, Clayton testified that he explained to the Board that there had actually been a merger of several plants. Clayton's testimony concerning his efforts at

three separate meetings of the Board to persuade it that plaintiffs were indeed a new group is essentially unchallenged and is bolstered by the minutes of the Board's meetings.

Thus it is clear that, even at the Board's September, 1969 meeting when plaintiffs' pension rights were first discussed, the Board was aware that there was some factual dispute concerning plaintiffs' eligibility to be treated as a new group. The Board nevertheless sent a letter to Continental October 15, 1969 denying Continental's request to have plaintiffs treated as a new group without even waiting for Clayton to provide additional information to it, as he had promised to do. When Clayton again raised the question whether plaintiffs should be treated as a new group at its meetings in January and February-March, 1970, the Board indicated that it required some further written description of the circumstances surrounding the merger. Yet the Board totally failed to take any affirmative action, [1128] such as contacting Local 449, to obtain the required information. The Board also failed to notify any of the plaintiffs or their collective bargaining representative, Local 449, that Continental's application had been rejected or that the Board required further information.

Moreover, when Miles applied for a pension in 1976, the Board took virtually no action to determine whether plaintiffs should be treated as a new group. There is no apparent reason why the Board could not have made such a determination in 1976. Rather than doing so, the

Board simply relied on the vote taken at its meeting in September, 1969 despite the fact that, as shown by the Board's own minutes for the February-March, 1970 meeting, the matter was still under consideration after 1969. Furthermore, Clayton attempted to have the Board resolve Miles's application at three meetings in 1976 and informed the Board that the matter had been considered at several meetings in 1969. In view of the Board's own minutes and Clayton's continued efforts to have plaintiffs treated as a new group, it was incumbent upon the Board to do more than simply refer to its earlier vote. The Board could and should have initiated an inquiry into the circumstances surrounding Continental's consolidation of its trucking operations in 1969.

The Board's entire course of conduct with regard to plaintiffs' entry into the Teamsters Plan indicates an extremely cavalier attitude on its part. There is no substantial question that under the actual circumstances [1129] of the merger as proven at trial plaintiffs were indeed a new group under the Teamsters Plan. In denying plaintiffs credit for past service, the Board was not acting in its discretion to interpret and apply the rules of the Teamsters Plan in a rational manner. Rather, the Board based its decision on an erroneous understanding of facts after having been repeatedly told by Clayton that its understanding was erroneous and without taking any affirmative steps to determine the true facts. It exhibited such conduct not only in 1969 and 1970 when plaintiffs first joined the Teamsters Plan but also in 1976 when Miles applied to receive pension benefits. In such circumstances, the Board's decision to

deny plaintiffs past service credit cannot be said to have an adequate basis in principle or reason. I therefore conclude that the Board's decision was arbitrary and capricious and that plaintiffs are entitled to judgment on their second and fifth causes of action.

Plaintiffs' Third and Sixth Causes of Action

These claims for relief allege that the Teamsters Plan's Board of Trustees agreed to allow them credit for past service. This allegation is apparently based on Clayton's testimony that at the February-March, 1970 meeting of the Board he persuaded a number of trustees that plaintiffs were in fact a new group.

According to Clayton's testimony, a majority of trustees (i.e., Dixon, Ryann, Durkin and Clayton himself) [1130] at the February-March meeting of the Board expressed an opinion that plaintiffs were a new group. However, no formal action was taken by the Board to accept plaintiffs as a new group at this or any subsequent meeting. Instead, the Board, at Mosley's suggestion, indicated a desire to receive further information from Local 449. The Board's actions at the February-March meeting are simply too tentative to support a finding that it agreed to allow plaintiffs credit for past service. If such a commitment had been made, the Board would not have required any further information. Moreover, as Tabor testified, the Board never formally reconsidered its September, 1969 vote that plaintiffs would not be treated as a new group. Thus, the Board's actions at the February-March

meeting cannot be said to constitute an agreement to grant plaintiffs past service credits. Plaintiffs' third and sixth causes of action must therefore be dismissed.[35]

Plaintiffs' First and Fourth Causes of Action

In their first and fourth claims for relief, plaintiffs allege that they are entitled to receive past service [1131] credits based on an agreement among the plaintiffs, Local 375, Local 449 and Continental prior to the merger that plaintiffs would be accepted into the Teamsters Plan as a new group and would receive past service credit upon fulfilling the five-year requirement. *See*, Second Amended Complaint, paragraphs 21, 23 and 43. Such claims have been asserted only against the Teamsters Plan.

These causes of action provide no basis for relief. There is no significant evidence that the Teamsters Plan itself ever agreed to treat plaintiffs as a new group or to award them past service credit. Indeed, the evidence clearly establishes that its Board of Trustees rejected Continental's application to accord plaintiffs new group status in September, 1969. The Board did discuss plaintiffs' status at various meetings thereafter and demonstrated a willingness to reverse its prior decision, but it did not at any time agree to treat them as a new

[35] My conclusion in this regard is not inconsistent with my finding that there was no clear and continuing repudiation of plaintiffs' rights to receive past service credit until Miles's application was rejected in 1976. Plaintiffs' third and sixth causes of action present the question whether the Board had firmly decided to *grant* plaintiffs such credit. The question whether the Board clearly *repudiated* plaintiffs' rights to receive such credit is, of course, an entirely different matter.

group. *See,* discussion with respect to the third and sixth causes of action, *supra.* Nor is there any indication that an agreement by or between the other parties would be binding upon the Teamsters Plan. Therefore, plaintiffs' first and fourth claims for relief must be dismissed.

Plaintiffs' Seventh Cause of Action

This cause of action alleges that Clayton and Buckinroth fraudulently represented to plaintiffs that [1132] they would receive past service credit under the Teamsters Plan.[36] The essential elements of a cause of action for actual fraud are: misrepresentation of a material fact; falsity of such representation; scienter; reliance; and damages. *Mallis* v. *Bankers Trust Co.,* 615 F.2d 68, 80 (2d Cir. 1980), *cert. denied,* 449 U.S. 1123 (1981); *Camelot Group, Ltd.* v. *W.A. Krueger Co.,* 486 F.Supp. 1221, 1228, n.21 (S.D.N.Y. 1980); *Jo Ann Homes at Bellmore, Inc.* v. Dworetz, 25 N.Y. 2d 112, 119, 302 N.Y.S.2d 799, 803 (1969); *Meese* v. *Miller,* 436 N.Y.S.2d 496, 499 (4th Dept. 1981); *Brown* v. *Lockwood,* 432 N.Y.S.2d 186, 193 (2d Dept. 1980). A false promise concerning employment benefits may provide the basis for a claim for fraud. *See, e.g., Aspesi* v. *Shahinian Acoustics, Ltd.,* 443 N.Y.S.2d 242 (2d Dept. 1981).

[36] The Second Amended Complaint alleges that Walker, not Buckinroth, committed fraudulent misrepresentations. The evidence adduced at trial shows that the alleged fraud was committed (if at all) by Buckinroth. Such a discrepancy is immaterial, however, inasmuch as Walker is sued only in his capacity as President of Local 449. In other respects, I granted plaintiffs' motion to conform the allegations of their seventh cause of action to the evidence at trial. Tr.Tr., Vol. IV, at 56-59.

Plaintiffs bear the burden of establishing each element of their claim by "clear and convincing" evidence. [1133] *Ajax Hardware Mfg.* v. *Industrial Plants Corp.*, 569 F.2d 181, 186 (2d Cir. 1977); *Simcuski* v. *Saeli*, 44 N.Y.2d 442, 452, 406 N.Y.S.2d 259, 265 (1978); *Stephenson* v. *Lord*, 421 N.Y.S.2d 730, 731 (3d Dept. 1979). "Clear and convincing" evidence is generally taken to mean a clear preponderance of proof. The burden of proof in fraud cases is "far more demanding" than that imposed in ordinary civil actions. *JoAnn Homes at Bellmore, Inc.* v. *Dworetz, supra*, 25 N.Y.2d at 121, 302 N.Y.S.2d at 805. *See* also, *Ajax Hardware Mfg.* v. *Industrial Plants Corp., supra*, at 186. Plaintiffs have failed to sustain their burden with respect to the seventh cause of action.[37]

Prior to the occurrence of the merger, plaintiffs were apparently told that some arrangement would be made whereby they would not lose pension credit for time spent under the Continental plan. Such assurances were given by Buckinroth at the meeting held immediately prior to the merger and by Clayton during conversations with Moriarty. Buckinroth and Clayton did not expressly state that plaintiffs would definitely receive past service credit, but only that some arrangement would be made in the future. [1134] Moreover, plaintiffs knew that no definite conclusion concerning their pension rights had been reached prior to the merger. There is no significant evidence tending to show that Buckinroth's and Clayton's assurances prior to the merger were fraudulent. Rather, Buckinroth's and Clayton's

[37] Defendants have suggested that the seventh cause of action is time-barred. However, I prefer to dispose of such claim on its merits.

statements were made in the genuine belief that the Teamsters Plan would in fact grant past service credit to plaintiffs. Certainly, their assurances had a substantial basis in that Continental was establishing a new division and plaintiffs would therefore be entitled to be treated as a new group. In short, Buckinroth and Clayton had no reason to believe prior to the merger that the Teamsters Plan would not grant past service credits to plaintiffs and their assurances to plaintiffs were made in the good faith belief that the Teamsters Plan would grant such.

Any statement made by or on behalf of Clayton, Local 375 or Local 449 following the merger cannot realistically form the basis for plaintiffs' fraud claim. With respect to such statements, the element of reliance is wholly lacking. Even if such statement could provide a basis for a cause of action based on fraud, there is no evidence that any representative or agent of Local 449 ever represented to plaintiffs after the merger that they would be granted past service credit. While there is evidence that Clayton did make such assurances after the merger had taken place, such evidence is insufficient to [1135] sustain a cause of action for fraud. For example, Miles's testimony that Clayton told him in several telephone conversations after the merger that plaintiffs' pension rights were "being taken care of" does not indicate that false representations had been made by Clayton. Rather, such a statement reflects the fact that Clayton and the Board were still attempting to resolve plaintiffs' pension rights, an effort which continued until the Board's meeting in February-March, 1970. Stuermer also testified that Clayton told him that he would be sent

"a paper" resolving the pension matter. According to Clayton, however, Stuermer simply misunderstood Clayton's statements. In most respects, Clayton's testimony was highly credible, and Clayton's account of his telephone conversation with Stuermer is entirely plausible. Moriarty provided testimony concerning statements made by Clayton, but his testimony was so vague and contradictory in this regard as to be of little weight. Moriarty also denied having discussed plaintiffs' pension rights with Clayton in connection with his claim for benefits arising out of the 1969 accident. Furthermore, it appears that even after the Board of Trustees voted to reject Continental's application to treat plaintiffs as a new group, Clayton believed in good faith that the matter could be straightened out and that plaintiffs would ultimately be given past service credit.

Thus, plaintiffs have failed to demonstrate that actual fraud was committed by Local 375, Local 449 or [1136] Clayton in connection with the merger. Their seventh cause of action may also be interpreted as stating a claim for constructive fraud, however. Constructive fraud involves breach of a fiduciary duty which is deemed fraudulent due to the violation of some confidence or injury to some public or private interest worthy of special protection under the law. *Brown* v. *Lockwood, supra*, at 13. *See also, Gordon* v. *Bialystoker Ctr. & Bikor Cholim, Inc.*, 45 N.Y.2d 692, 698-99, 412 N.Y.S.2d 593, 596-97 (1978); *Roman* v. *City of New York*, 442 N.Y.S.2d 945, 947 (S.Ct., Queens Co. 1981). In order to support a claim for constructive fraud, a plaintiff need not prove *scienter* on the part of defendant but must demonstrate

that the defendant breached some fiduciary or confidential relationship. *Brown* v. *Lockwood, supra,* at 193-94.

I assume *arguendo* that the doctrine of constructive fraud applies to the relationship between a labor union and its members. Nevertheless, I cannot conclude that either Local 375, Local 449 or Clayton breached any fiduciary duty to plaintiffs. Prior to the merger, said defendants quite reasonably believed that plaintiffs would be treated as a new group. Local 449 apparently did not even learn that plaintiffs had not been granted such status until March, 1970 when Mosley, Clayton and Wells discussed the matter in Washington. At that time, Wells provided certain information to Mosley. Local 449 was not asked to take any further action, nor would it have had reason [1137] to believe that any further steps by it were required. Clayton appears to have been remiss in certain aspects (e.g., his own testimony notwithstanding, he failed to provide a letter to the Board as requested at its January, 1970 meeting) but he conducted his relations with respect to plaintiffs in an honest and diligent manner. His belief after his conversation with Mosley and Wells in March, 1970 that plaintiffs' pension rights would be properly resolved appears to have been entirely reasonable.

Therefore, plaintiffs have failed to prove either actual or constructive fraud on the part of defendants Local 449, Local 375, or Clayton.

Appendix—Findings of Fact, Conclusions of Law and Order of Elfvin, U.S.D.J., Dated March 11, 1982.

Relief

Miles is entitled to judgment based on the second cause of action set forth in the Second Amended Complaint. Therefore, it is hereby ORDERED that the Teamster Plan shall award Miles a pension based on service commencing March 19, 1953 through the date of his retirement, January 9, 1976. It is further ORDERED that Miles shall be entitled to judgment in the amount of $37,814, plus benefits of $511 per month which may accrue between the time of entry of my Findings of Fact, Conclusions of Law, and Order and entry of final judgment pursuant hereto, together with interest.[38]

[1138] Moriarty, Darlick, Stuermer and Zastrow are entitled to judgment based on the fifth cause of action set forth in the Second Amended Complaint. Therefore, is is hereby ORDERED that the Teamsters Plan shall award said plaintiffs credit for service in the employ of Continental as members of Local 375 prior to July 1, 1969, to wit: Moriarty shall be entitled to credit for

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[38] Said amount represents the amount of Miles's monthly pension ($511) multiplied by 74, the number of months from the date of Miles's retirement to the entry of my Findings of Fact, Conclusions of Law, and Order.

Interest shall be calculated on a monthly basis—i.e., based on the amount of benefits which had been withheld prior to any given month. For example, for the month February, 1976, interest shall be calculated on the amount of $511; for the month March, 1976, interest shall be calculated on the amount of $1022; for the month April, 1976, interest shall be calculated on the amount of $1533; etc.

The rate of interest shall be 6% per annum for the months February, 1976 through June, 1981. Commencing July, 1981, the rate of interest shall be 9% per annum. *See*, CPLR §5004.

service beginning February, 1953 until July 1, 1969, as well as for the length of service ultimately rendered thereafter; Darlak shall be entitled to credit for service beginning September, 1960 until July 1, 1969 as well as for the length of service ultimately rendered thereafter; Stuermer shall be entitled to credit for service beginning November, 1961 until July 1, 1969 [1139] as well as for the length of service ultimately rendered thereafter; Zastrow shall be entitled to credit for service beginning May, 1956 until July 1, 1969 as well as for the length of service ultimately rendered thereafter.

Plaintiffs may also be entitled to an award of attorney's fees under 29 U.S.C. §1132 (g). However, their claim for such an award shall be dismissed unless an appropriate motion, together with supporting affidavits, is filed within thirty days after entry of these Findings of Fact, Conclusions of Law, and Order.

It is further ORDERED that defendants shall be entitled to judgment dismissing plaintiffs' first, third, fourth, sixth and seventh causes of action.[39]

Dated: Buffalo, N. Y.
March 11, 1982

JOHN T. ELFVIN
U.S.D.J.

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[39] The Clerk is directed to refrain from entering final judgment at this time. Entry of final judgment shall await resolution of plaintiffs' claim for attorney's fees.

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing Filed March 29, 1983

UNITED STATES COURT OF APPEALS
Second Circuit

(United States Court of Appeals)
(Filed Mar 29 1983)
(Illegible)

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-ninth day of March, one thousand nine hundred and eighty-three.

HAROLD MILES, *et al.*,
Plaintiffs-Appellees,

v.

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN,
Defendant-Appellant,

ERVIN WALKER, etc.,
Defendants.

No. 82-7274.

A petition for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by counsel for the plaintiffs-appellees, Harold Miles, *et al.*,

Appendix—Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing Filed March 29, 1983.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing *in banc* has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, *Clerk*
by FRANCIS X. GINDHART,
Chief Deputy Clerk

[1047] **Plaintiffs' Exhibit 19—Reason and Retirement Fund Stipulation**

PENSION AND RETIREMENT FUND STIPULATION

NEW YORK STATE TEAMSTERS CONFFERENCE PENSION & RETIREMENT FUND

DATE June 26 1970

EFFECTIVE 7-1 1969

1. The employer agrees to contribute the sum of $.25 per hour paid to any and all of his employees covered by the Union Agreement not to exceed $10.00 per week to the N.Y.S.Teamsters Conference Pension & Retirement Fund on or before the 10th day of the month following that month in which said monies accrued.

EFFECTIVE _____ 19

2. The above rates shall be $ —— per hour and $ —— per week.

3. Any and all increases negotiated between the employer and the N.Y.S.Teamsters Conference Pension and Retirement Fund and or the Local Union hereafter over and above the rates specified herein shall automatically supercede the rates specified herein.

4. Failure on the part of the employer regularly to contribute as specified hereinabove shall make him liable for all claims, damages, attorney fees, court costs, etc., plus all arrears in payments, plus 10% penalty and the Union shall not be bound by any arbitration on no strike provisions in the Labor Agreement. In the event an employer is in arrears and the Union or its members stop working for collection, in addition to the above, the employer must reimburse all employees for all time lost during stoppage. The late payment of arrears by any employer shall not release or exculpate him from his liability to pay all

claims arising during the period when he was in arrears as determined solely by the Trustees.

5. The N.Y.S.T.Conference Pension & Retirement Fund may at any time check the payroll records of any and all employees of the employer covered by this agreement at a time mutually agreed upon at no charge to the employer, but in the event it is found that the employer had not been complying with the Pension & Retirement Fund provisions of the Agreement, the Employer shall pay the full cost of all checking of its books that may be necessary by the Fund Officials and in addition shall be responsible for any and all claims that were not covered and must pay whatever discrepancies may exist to the Fund plus 10% penalties. The employer shall pay reasonable attorney fees for collecting any payments in arrears. During the life of this Agreement it is agreed that upon becoming a member of the N.Y.S.Teamsters Conference Pension & Retirement Fund and making the payments to said Fund as provided for herein, the Employer shall be relieved of any and all responsibility of providing Pension benefits other than those provided by the Fund.

[1048] 6. The employer agrees to furnish such information as may be necessary from time to time concerning its employees as will enable the Pension fund to carry out its duties to furnish adequate coverage for such employees.

7. Should any of the provisions of the Collective Bargaining Agreements be declared to be in violation of the Labor-Management Relations Act of 1947, as amended or any other State or Federal Statute or

regulation, such declaration shall in no way impair the effectiveness or continuity of the provisions of this contract which establish Pension & Retirement benefits and provide for the payment of contributions by the employer to such fund, and such provisions are hereby expressly declared to be saved from such illegality.

8. There shall be no deductions from equipment rental on owner-operators by virtue of contributions made to the Pension & Retirement Fund, regardless of whether the equipment rental is at the minimum rate or more.

9. If a regular employee is absent because of illness or off-the-job injury and notifies the employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If regular employee is injured on the job, the employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months.

10. If an employee is granted a leave of absence, the employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

11. Payments to the Fund must be paid by the employer during employee's vacation periods.

12. The employer may contribute to the N.Y.S.Teamsters Conference Pension & Retirement Fund for employees working outside the jurisdiction of the Collective Bargaining Agreement in the amounts

indicated above. However, if these employees are included, the employer agrees to make contributions on *all employees* in this category subject to the same conditions and on the same basis as is provided in this Stipulation, and the employer also agrees to continue to make contributions on *all of these employees* for as long as there shall be a Collective Bargaining Agreement or Agreements between the employer and the Union subject to any and all rules and regulations or decisions covering this group that are issued by the Board of Trustees.

13. The employer agrees that should he not make contributions on 100% of all his non-union employees as required herein, the N.Y.S.Teamsters Conference Pension and Retirement Fund will not pay nor be liable or obligated to pay any pension or retirement or other benefits to all his non-union employees whatsoever, whether or not contributions were made on such individuals, in which event the employer shall pay to any or all such non-union employees any and all pension and retirement or other benefits that such employee or employees may have been entitled to or are later entitled to until such time that the Pension Board of]1049] Trustees once again extends coverage to this group and only under terms decided solely by the Board of Trustees of the N.Y.S.Teamsters Conference Pension & Retirement Fund.

14. This memorandum shall become effective as of the date of execution thereof and the payments above provided shall be payable from on or after 7-1-69. This Agreement shall continue in full force and effect for the

same term as the Labor Agreement and shall continue in force and effect for the life of all future Agreements replacing the present Labor Agreement with the exception that any and all conditions for contributions over and above those specified herein shall be applicable.

N.Y.S.T.CONFERENCE PENSION
& RETIREMENT FUND &
TEAMSTERS LOCAL #449
City Buffalo, N.Y.
By W. D. BUCKINROTH
Title B.A.
CONTINENTAL CAN CO., INC. #490
NAME OF COMPANY
Address Clay St., Tonawanda, N.Y.

By C. MICHAEL MURPHY
Title Asst. Mgr.

No. 82-2131

IN THE

Supreme Court of the United States

October Term, 1982

HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARTY, JAMES STEURMER and EDWARD ZASTROW,

Petitioners,

vs.

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN,

Respondent.

Brief of Respondent New York State Teamsters Conference Pension and Retirement Fund in Opposition to the Petition for Writ of Certiorari

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Of Counsel
CONSTANCE J. ANGELINI

Under the "new group" rule of the Teamsters Plan, an employee who joins the Plan as part of a new group is entitled to past service credit. A "new group" is a bargaining unit of employees which commences participation in the Plan on the same date that the employer first becomes obligated to contribute to the Plan. The Court of Appeals for the Second Circuit determined that the Board of Trustees' decision to deny the petitioners new group status was reasonable inasmuch as the evidence showed that the petitioners joined the Plan in July of 1969, one and one-half years *after* the employer commenced participation in the Plan.

Questions Presented.

(1) Was the Board's decision to deny new group status and past service credit arbitrary and capricious?

(2) Were the procedures utilized by the Board in making its decision and communicating it to the employees fair and reasonable?

Page

Table of Contents.

Page

Index to Appendix.

TABLE OF AUTHORITIES.

CASES:

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OCTOBER TERM, 1982

No. 82-2131

HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARTY, JAMES STEURMER and EDWARD ZASTROW,

Petitioners,

vs.

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN,

Respondent.

Brief of Respondent New York State Teamsters Conference Pension and Retirement Fund in Opposition to the Petition for Writ of Certiorari.

Petitioners seek review of a decision by the United States Court of Appeals for the Second Circuit which held that the Board of Trustees (the "Board") of the New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan (the "Teamsters Plan") acted rationally and with adequate regard to the duties

owed to petitioners when it denied petitioners new group status under the Plan. The Court also reversed an award of attorneys' fees made by the district court to petitioners' attorneys. The Teamsters Plan opposes the issuance of a Writ of Certiorari to review the Court of Appeals' decision because the decision below was clearly correct and there is no conflict among the circuits on this issue requiring resolution by this Court.

Opinions Below.

District Court.

A judgment was entered by the district court for the Western District of New York, John T. Elfvin, Judge, holding, in an action under ERISA, that the Board of Trustees of the Teamsters Plan had acted arbitrarily and capriciously in denying the petitioners credit under the Plan for years of service duringwhich employer contributions were not paid on their behalf, and ordering the Plan to grant the petitioners such credit. The district judge also awarded attorneys' fees to petitioners. The Findings of Fact and Conclusions of Law and Order of the district court are set forth in the Petition at 21(a). The Decision and Order awarding attorneys' fees is set forth herein (A-1).

Court of Appeals.

On January 20, 1983 the Court of Appeals for the Second Circuit reversed the judgment of the district court, and vacated the award of attorneys' fees. The opinion of the Court of Appeals, set forth in the Petition at 1(a), is reported at 698 F. 2d 593 (2d Cir. 1983).

Jurisdiction.

The jurisdictional requisites are set forth in the Petition at page 2.

Statutory Provisions Involved.

The statutory provisions involved are set forth in the Petition at page 2.

Statement of the Case.

Petitioners commenced this action in the Western District of New York in August 1977 to determine their eligibility for pension benefits from the respondent New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan. Petitioners, all of whom had worked for Continental Can Company, Inc., ("Continental") for some years before Continental began to contribute to the Teamsters Plan on their behalf, sought to establish their right to past service credit for years during which employer contributions were not paid. The facts found by the district court revealed that Continental, at all relevant times, operated three plants in the Buffalo, New York area. Prior to July 1, 1969, Continental's truck drivers were assigned to separate divisions: The drivers at the Clay Street plant in Tonawanda, New York to plant No. 418; the drivers at the Colvin Boulevard plant in Buffalo, to plant No. 81; and the drivers at the Shawnee Road plant in Buffalo, New York, to plant No. 506.

Prior to July 1, 1969, the petitioners were assigned to plant No. 506 at Shawnee Road, and were represented by Teamsters Union Local No. 375. Teamsters Union Local No. 449 represented the drivers at the Clay Street and Colvin Boulevard plants. The collective bargaining agreement

between Local 449 and Continental required Continental to contribute to the Teamsters Plan on behalf of the Local 449 drivers. Continental commenced making contributions on these drivers in 1967. Continental did not contribute to the Teamsters Plan on behalf of the petitioners (represented by Teamsters Local 375), but contributed on their behalf to a pension plan administered by Continental.

On July 1, 1969, Continental merged the three trucking divisions into a single plant No. 490. The merger did not entail a physical transfer of drivers, but only minor changes in route assignments and the introduction of a central dispatch system. Because Local 449 had a union shop agreement with Continental, the merger required the petitioners to join the Local 449 bargaining unit. Since the petitioners were covered by the Local 449 bargaining agreement, the employer became obligated on July 1, 1969 to contribute on their behalf to the Teamsters Plan and commenced making contributions on that date.

In September 1969, Continental, at the urging of Local 375's President, Stanley Clayton, applied to the Teamsters Plan to have the petitioners treated as a "new group," thus enabling the petitioners to obtain past service credit. Under the "new group" rule, an employee who joins the Teamsters Plan as part of a new group is entitled to receive credit for past service with the employer, up to a maximum of twenty years, if the employee works for the employer for another five years and the employer contributes to the Teamsters Plan on behalf of the employee for those five years. A "new group" is a unit of employees which commences participation in the Teamsters Plan on the same date that the participating employer first becomes obligated to, and does make, contributions to the

Plan on behalf of its employees. The purpose of the rule is to encourage new bargaining units to join the Teamsters Plan.

The Board rejected Continental's application because the petitioners were not part of the Local 449 bargaining unit on the date on which the employer first became obligated to contribute to the Plan (December 1967). This rejection was communicated to Continental and to Stanley Clayton in October of 1969. The Board also mistakenly believed at that time that the petitioners were merely transferred into an existing plant already participating in the Teamsters Plan. The Board was subsequently informed by Clayton that there had been no physical transfer, but a merger of operating divisions. Clayton contended that the new division constituted a new group. Although the Board remained willing to receive additional information concerning petitioners' status, it never rescinded the 1969 decision denying petitioners new group status (and past service credit) because under the Board's interpretation of the new group rule, petitioners were not part of a new group and, hence, not entitled to past service credit regardless of whether they were merged or transferred into the bargaining unit. Under the rule, an employee who becomes a member of a particular bargaining unit after the date on which the bargaining unit first participated in the Plan is not entitled to past service credit.

When petitioner Harold Miles retired six years later, in addition to a pension under the Continental plan, he applied for pension benefits from the Teamsters Plan. He was informed by the Plan administrator that he was not eligible for a pension because he had only six and one-half years of credited service under the Plan (since 1969), and

that he was not entitled to past service credit. Miles complained to Stanley Clayton, who again raised the issue before the Board. The Board, however, on the basis of its previous decision, concluded that the petitioners were not entitled to new group status.

The decision of the District Court.

The district court concluded that the Board of Trustees acted arbitrarily and capriciously in denying petitioners past service credit. Judge Elfvin found that the Board's interpretation of the new group rule was incorrect, and that the petitioners constituted a new group under the rule. He cited four items of evidence supporting his interpretation of the rule: (1) The testimony of Stanley Clayton and Irvin Walker, the President of Local 449, that the petitioners were a new group; (2) The execution of a new pension plan participation agreement between Local 449 and Continental, in January, 1970; (3) Petitioner Timothy Moriarty's receipt of benefits from the Teamsters Health and Welfare Fund; and (4) The "fact" found by him, that the petitioners did not have to join the Teamsters Plan when they joined Local 449. The judge next determined that the Board had acted arbitrarily and capriciously in failing to reach the "correct" interpretation of the new group rule. He found that the Board's factual assumptions underlying its decision were incorrect, and that the Board had a duty to investigate the petitioners' situation, and a duty to notify the petitioners of the decision in 1969, and a duty to initiate a new investigation when Miles applied for a pension in 1976.

The district judge also granted the petitioners' post-trial motion for an award of attorneys' fees under 29 U.S.C. §1132(g)(1). The judge ruled that the behavior of the

Board of Trustees justified an award of attorneys' fees against the Teamsters Plan.

The decision of the Court of Appeals.

The Teamsters Plan appealed the judgment of the district court to the Court of Appeals for the Second Circuit. The Court of Appeals subsequently reversed the judgment of the district court and vacated the award of attorneys' fees.

The Court determined that the district judge exceeded the scope of judicial review which may be properly applied to the actions of pension plan administrators. The Court found that the Board's interpretation of the new group rule, which was at odds with that of the petitioners and district judge, was reasonable and thus should not have been disturbed by the lower court.

According to the Court of Appeals, the evidence supporting the district judge's interpretation of the rule was not persuasive. The Court found suspect the testimony of Stanley Clayton and Irvin Walker, both defendants in the action, that the petitioners were a new group. The Court, by clear implication, did not credit Walker's opinion that the signing of a new participation agreement in 1970 was necessitated only by the fact that a new group had begun participation in the Plan. Walker, as a defendant and union leader, was in no position to make such an assessment regarding a pension fund rule. Similarly, Moriarty's receipt of benefits from the Teamsters Health and Welfare Fund could not be used to support the district judge's conclusion since no evidence or testimony was received to explain the operation of that fund's new group rule. Also, the court determined that the district judge's finding that

the petitioners did not have to join the Teamsters Plan was "clearly erroneous." The Court examined the policy behind the new group rule, and contrary to the finding of the district court, determined that the policy was not implicated in the decision to deny new group status.

The Court concluded its analysis by pointing out that even if the Board initially misunderstood the facts regarding the merger of the employer's corporate divisions, the facts which were before the Board, and about which there was no confusion or misunderstanding, provided substantial support for the Board's decision. The Court did not acknowledge or imply in any way that the Board made its determination upon incorrect factual assumptions. Rather, the Court pointed out that the evidence had shown that under the Board's interpretation of the new group rule, the new employees of a previously participating employer were not entitled to past service credit regardless of whether they were merged or transferred into the applicable bargaining unit.

Thus, in view of the fact that the evidence in support of the Board's decision was substantial, the Board was not required to initiate its own investigation into the petitioners' circumstances, particularly in view of the Board's repeated willingness to receive and consider additional information from petitioners or petitioners' representatives. The Court also concluded that although the Board did not notify the petitioners individually of its decision, it did communicate with Continental and Clayton, a union representative. This notice was sufficient because the petitioners themselves never asked the Board for a determination regarding their status, and it was Continental and Clayton who initiated the inquiry regarding petitioners' status.

The Court then vacated the award of attorneys' fees which the district judge had made to petitioners' attorneys.

REASONS FOR DENYING THE WRIT.

ARGUMENT.

Petitioners contend that the procedures employed by the Board in reaching its decision and communicating it to the petitioners were unfair. They base their argument on their contentions that the Board acted in the instant case upon a misapprehension of the facts, and that the Board was under a duty to conduct its own investigation so as to apprehend the "true" facts.

The Court of Appeals addressed this argument when it noted that the facts which petitioners consider so crucial to the determination of new group status were clearly immaterial to the issue. The testimony of the Plan's actuary, Sol Tabor, demonstrates that those facts about which there might have been some confusion were irrelevant to the determination of whether petitioners were a new group. The facts which were known to the Board in September 1969, and which formed the basis for the Board's decision were without dispute: Local 449 had a collective bargaining agreement with Continental Can providing for pension fund contributions on employees in its bargaining unit; the obligation to contribute commenced in 1967; in July of 1969, petitioners were forced to join this bargaining unit because of a change in the structure of the employer's business; in July 1969, the employer commenced making contributions on the petitioners. The new entity created (whether the result of merger or transfer) was not a new group under the Teamsters Plan inasmuch

as the group, at least for the purposes of pension contributions, was already in existence for one and one-half years.

Thus, the Court of Appeals did not state or imply that the Board acted on a misapprehension of the facts or that the Board's decision was based on erroneous facts, as petitioners contend. What the Court said was that the Board's initial misunderstanding had no effect on its decision inasmuch as the Board's decision was predicated on information about which there was no misunderstanding or error.

The Court, therefore, refused to rule that the Board of Trustees had a duty to conduct its own investigation into the facts surrounding petitioners' eligibility for new group status. Certainly, under the facts of the instant case, such a duty cannot be implied. Had the Board conducted its own investigation, the decision, given the Board's interpretation of the new group rule, could not possibly have been different. It is up to the Board of Trustees to determine whether an independent investigation is necessary. That decision, like others made by pension fund fiduciaries, is subject to review by the courts for unreasonableness. However, to require independent investigation where the investigation could not possibly inure to the benefit of the affected participants would amount to judicial fiat creating a duty to investigate in every case. Such a requirement would be onerous and burdensome, and is uncalled for on the facts of this case where the Board consistently remained willing to receive and consider any information submitted to it concerning petitioners' status.

Petitioners also cite as error the Court's determination that the Board was not required to communicate its decision directly to each of the affected individuals. Petitioners fail, however, to point out that the petitioners

never asked the Board for a determination regarding their status. It was Continental and Stanley Clayton who requested the determination. The Board's decision was communicated to them with the completely reasonable expectation and assumption that the decision would be communicated to petitioners on whose behalf the request was made. There is no reason to assume that the Board would not have given the information to petitioners if they had simply asked for it.

Petitioners speculate that they may have been deprived of the opportunity to take action to remain as participants in Continental's plan had they been aware of the denial of new group status in 1969. In view of the fact that the evidence showed that Continental was obligated to contribute to the Teamsters Plan on behalf of petitioners, the possibility that they *might* have been able to remain in Continental's plan is speculative to the point of ephemerality. Surely, it provides no basis for concluding that petitioners were injured by their lack of information regarding their status in the Teamsters Plan.

Finally, the petitioners claim that the Second Circuit should have remanded the case to the Board of Trustees for a consideration of the issue in light of the facts presented to the Board by Clayton. Respondent contends that a remand was unnecessary here inasmuch as it is undisputed that the facts of the merger were repeatedly put before the Board by Clayton. The record shows that the Board was apprised of the facts, but declined to act on them inasmuch as its decision to deny new group status was based on other more pertinent facts about which there was no misunderstanding. The Second Circuit did not then decide the issue on the basis of evidence never presented to the Board of Trustees, but resolved it on the basis of all

the evidence which, over the course of its proceedings, was available to the Board. There is, therefore, no conflict between the Second Circuit's decision and that of the Seventh Circuit in *Wardle v. Central States, Southeast and Southwest Areas Pension Fund,* 627 F. 2d 820 (7th Cir. 1980).

Petitioners also contend that the Second Circuit's decision conflicts with that of the United States Court of Appeals for the District of Columbia in *Maggerd v. O'Connell,* 671 F. 2d 568 (D.C. Cir. 1982). That Court describes the role of the reviewing court in the following way:

> "We must be satisfied that the (trustees have) given reasoned consideration to all the material facts and issues; that its findings of fact are supported by substantial evidence." 671 F. 2d at 573.

Respondent contends that there is no conflict between this approach and that articulated by the Second Circuit in the instant case. The Second Circuit applied the traditional "arbitrary and capricious" standard of review not only to the Board's findings of fact, but also to its procedures:

> "We have stated that the lawful discretionary acts of a pension committee should not be disturbed absent a showing of bad faith or arbitrariness. . . . Where the trustees of a plan impose a standard not required by the plan's provisions, or interpret the plan in a manner inconsistent with its plain words or by their interpretation render some provisions of the plan superfluous, their actions may well be found to be arbitrary and capricious."

Miles, supra, 698 F. 2d 597 (citations omitted).

The Second Circuit Court did not "rubber stamp" the Board's decision. It carefully considered both the evidence, which was undisputed, in support of the Board's findings, and the procedures utilized by the Board in dealing with the situation. The Court obviously believed that the Board had given reasoned consideration to the *material* facts. The Court (and the Board) disagreed with the petitioners on the issue of which facts were indeed material to the Board's decision. The Court, mindful of this conflict, noted that

> "Where both the trustees of a pension fund and a rejected applicant offer rational, though conflicting interpretations of plan provisions, the trustees' interpretation must be allowed to control." 698 F. 2d 593, citing *Lowenstern v. International Ass'n of Machinists and Aerospace Workers,* 479 F. 2d 1211, 1213 (D.C. Cir. 1973).

There is, therefore, no conflict between the decisions by the Second Circuit and the District of Columbia Circuit, and thus, no reason for this Court to review the issue.

Conclusion.

For all of the foregoing reasons, the Court of Appeals for the Second Circuit correctly concluded that the decision of the Board of Trustees of the Teamsters Plan was reasonable and fair. The petition for Writ of Certiorari, therefore, should be denied.

Respectfully submitted,

Peter P. Paravati, Counsel of Record

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Of Counsel,
CONSTANCE J. ANGELINI

APPENDIX.

Memorandum and Order of U.S. District Judge John T. Elfvin, Dated June 7, 1982.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARITY, JAMES STUERMER, EDWARD ZASTROW,

Plaintiffs,

vs.

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN,

and

ERWIN WALKER, as President of Local Union No. 449 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an Unincorporated Association,

and

STANLEY CLAYTON, individually and as President of Local Union No. 375 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an Unincorporated Association,

Defendants.

CIV-77-432

This is an action under section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132, in which plaintiffs seek a determination of their entitlement to receive benefits from the defendant New York State Teamsters Conference Pension and Retirement Fund Employee Benefit Plan ("the Teamsters Plan"). They claim to be entitled to receive such benefits based on credit for service in the employ of Continental Can Co., Inc. prior to 1969, the date of their initial participation in the Teamsters Plan. Essentially, their claims are premised upon the Teamsters Plan's so-called "new group rule," under which an employee who is a member of a group of employees which comes into the Teamsters Plan is entitled to receive credit for past service with the employer if the employee continues to work for the employer for another five years and the employer makes contributions to the Teamsters Plan on behalf of the employee for those five years.

Following a non-jury trial, I entered my Findings of Fact, Conclusions of Law and Order which determined that the Teamsters Plan's decision not to grant plaintiffs past service credit under the new group rule was arbitrary and capricious. The matter is currently pending before me on plaintiffs' application for an award of attorney's fees.

In an action by a participant in a pension plan under section 502 of ERISA, "the court in its discretion may allow a reasonable attorney's fee and costs of [the] action to either party." 29 U.S.C. §1132(g). By permitting pension claimants to recover attorney's fees, Congress intended to enable claimants to obtain effective legal representation and to distribute the cost of litigation fairly. *Carter v. Montgomery Ward & Co.*, 76 F.R.D. 565, 568 (E.D.Tenn. 1977). The propriety of a particular award of attorney's fees under ERISA must be determined by considering: (1) the degree of the offending party's culpability or bad

faith; (2) the ability of the offending party to satisfy an award of attorney's fees; (3) whether an award of attorney's fees would deter other persons from acting similarly under like circumstances; (4) the relative merits of the parties' position; and (5) whether the action sought to confer a common benefit on a group of pension plan participants. *Iron Workers Local No. 272 v. Bowen,* 624 F.2d 1255, 1266 (5th Cir. 1980); *Eaves v. Penn,* 587 F.2d 453, 465 (10th Cir. 1978); *Ford v. New York Central Teamsters Pension Fund,* 506 F.Supp. 180, 183 (W.D.N.Y. 1980), aff'd *per curiam* 642 F.2d 664 (2d Cir. 1981). The amount of a fee award should initially be determined by calculating the so-called "lodestar figure"—i.e., the number of hours expended by the claimant's attorney(s) working on the case multiplied by the hourly rate normally charged for similar work by attorneys of like skill in the area. *E.g., Cohen v. West Haven Bd. of Police Com'rs,* 638 F.2d 496, 505 (2d Cir. 1980); *Seabrook v. Postal Financial Services,* 527 F.Supp. 1006, 1008 (S.D.N.Y. 1981); *Blowers v. Lawyers Co-op Pub. Co., Inc.,* 526 F.Supp. 1324, 1326 (W.D.N.Y. 1981). This traditional formula has been applied in cases under ERISA. *Ford v. New York Central Teamsters Pension Fund, supra,* at 183; *Winpisinger v. Aurora Corp.,* 469 F.Supp. 782, 785 (N.D.Ohio 1979). The amount of the fee award may then be adjusted to reflect factors such as the skill required, the amount involved, the results obtained, and the experience, reputation and ability of the attorney. *Holmes v. Oxford Chemicals, Inc.,* 510 F.Supp. 915 (M.D.Ala. 1981). *See, Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974).

In the present case, plaintiffs seek an award of fees based on a lodestar figure of $24,200.50. They claim that the amount of the award should be at least *double* the lodestar figure in light of the foregoing considerations and because

their attorneys represented them on a contingency basis. The Teamsters Plan opposes any award of attorney's fees.

An award of attorney's fees in favor of plaintiffs against the Teamsters Plan is fully justified. As elaborated more fully in my findings of fact and conclusions of law, the Board of Trustee's decision not to treat plaintiffs as a new group for purposes of determining their eligibility to receive past service credit was based on its erroneous understanding of the circumstances of plaintiffs' entry into the Teamsters Plan. The Board had been repeatedly told by defendant Clayton, who was a member of the Board as well as President of the plaintiffs' former local union, that plaintiffs were indeed a new group entitled to past service credit. Nevertheless, the Board had failed to take any significant action to determine whether plaintiffs were a new group either in 1969 when they first joined the Teamsters Plan or in 1976 when plaintiff Miles retired. In general, as I indicated in my findings of fact, the Board exhibited an extremely cavalier attitude towards plaintiffs' application to be treated as a new group. Such gross and deliberate indifference on the Board's part is sufficiently culpable to warrant an award of attorney's fees against it.[1]

An award of attorneys' fees in the present case will also serve to deter other pension trustees from treating their

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[1]The Teamster Plan has suggested that an award of attorney's fees is inappropriate because I did not conclude that the Board's refusal to grant plaintiffs past service credit was committed in bad faith. However, plaintiffs' claims simply raised the question whether the Board's refusal was arbitrary and capricious, not whether it was in bad faith. The Board's conduct was sufficiently culpable to justify an award of attorney's fee, notwithstanding that I did not make (and was not called upon to make) a finding that the Board acted in bad faith. Such a finding is not a prerequisite to an award of attorney's fees under ERISA. *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980); *Ford v. New York Central Teamsters Pension Fund, supra*, at 182.

plan participants in such a callous manner. Certainly, the trustees of a pension plan owe participants in the plan a far greater duty to consider and investigate claims for benefits than was performed by the Board in the present case. I am unpersuaded by the Teamsters Plan's facile suggestion that an award of attorney's fees is not necessary to deter future culpable conduct inasmuch as the trustees are already held to a high standard of care; despite the Board members' individual legal obligatins, plaintiffs were ignored and severely mistreated by the Board. Imposition of fees against the Teamsters Plan will serve to notify its Board of Trustees as well as other pension plan trustees that the cost of litigation arising out of arbitrary and capricious conduct on their part will be borne by the pension trust rather than by individual claimants who have been wronged.

Furthermore, the relative merits of the parties' positions support an award of fees in plaintiffs' favor. As I noted in my findings of fact, the evidence that plaintiffs were a new group within the meaning of the Teamsters Plan was almost overwhelming. Contrary to the Teamsters Plan's suggestions, I did not merely determine that the trustees had made an "error in judgment." In my findings of fact, I expressly stated that, in rejecting plaintiffs' request for past sevice credit, "the Board was not acting in its discretion to interpret and apply the rules of the Teamsters Plan in a rational manner." Rather, the Board was acting on an erroneous understanding of facts, despite having been repeatedly told by Clayton that its understanding was erroneous and without taking any affirmative steps to investigate the true facts.

Turning to the particular amount of attorney's fees to be awarded, David C. Laub, Esq., plaintiffs' primary attorney, has submitted an affidavit indicating that the lodestar figure is $24,200.50. This amount represents fees

for some 294.7 hours of time expended by seven different attorneys on plaintiffs' behalf, compensated at rates ranging from $65 to $125 per hour. Because the rates utilized by plaintiffs are appropriate and the number of hours claimed is reasonable,[2] I adopt $24,200.50 as the lodestar figure.

I am also persuaded by plaintiffs' argument that the amount of the award should be greater than the lodestar

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[2]The lodestar figure has been computed as follows:

Attorney	*No. hours*	*Rate*	*Total*
Laub	21.4	$100	$ 2,140.00
	41.9	125	5,237.50
Feldman	107.8	65	7,007.00
	72.1	75	5,407.50
	27.9	90	2,511.00
	9.5	100	950.00
Macek	2.1	75	157.50
Dean	0.6	65	39.00
Friedman	7.3	65	474.50
Fink	2.1	65	136.50
Storrs	2.0	70	140.00
			$24,200.50

The different rates charged with respect to Laub and Feldman represent increases in their usual hourly billing rates during the course of this litigation.

Technically, plaintiffs' calculation of the lodestar figure is deficient inasmuch as there has been no showing of the legal training or experience of any of the abovenamed attorneys. Moreover, plaintiffs' attorneys have based their calculation on their own usual hourly billing rates rather than on the hourly rate normally charged for similar work by attorneys of like skill in this area. Nevertheless, the Teamsters Plan has not objected to the particular hourly rate claimed with respect to any of plaintiffs' attorneys. In the absence of any such objection and because the stated rates are generally reasonable and consistent with my own experience in cases involving claims for attorney's fees, I have applied the rates requested by plaintiffs' attorneys.

figure because their attorneys agreed to represent them on a contingency basis. Ordinarily, where an attorney undertakes representation on a contingency basis and his client ultimately prevails on the merits of the case, a statutory award of attorney's fees should be increased to reflect the risk that the attorney might receive no compensation. *E.g., Jones v. Diamond,* 636 F.2d 1364, 1382 (5th Cir.), *cert. dismissed sub nom.,* ____ U.S. ____, 102 S. Ct. 27 (1981) (42 U.S.C. §1988); *Copeland v. Marshall,* 641 F.2d 880, 892-93 (D.C.Cir. 1980) (*en banc*) (Title VII of Civil Rights Act of 1964).

The Teamsters Plan argues, however, that this general rule is not applicable herein because ERISA authorizes an award of fees regardless of whether a party prevails on the merits. Other statutes, such as Title VII of the Civil Rights Act of 1964 and the Civil Rights Attorney's Fees Awards Act of 1976, expressly condition a party's eligibility for an award of attorney's fees on that party's success on the merits.[3] Thus, the Teamsters Plan argues that, because

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[3]Title VII provides:

> "In any action or proceeding under this subchapter [42 U.S.C. §2000e *et seq.*] the court, in its discretion, may allow the *prevailing* party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee * * *." 42 U.S.C. §2000e-5(k). (Emphasis added.)

The Civil Rights Attorney's Fees Award Act of 1976 states:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the *prevailing* party, other than the United States, a reasonable attorney's fee * * *." 42 U.S.C. §1988. (Emphasis added.)

In contrast to these statutes, ERISA authorizes the court in its discretion to award attorney's fees to "either party." 29 U.S.C. §1132(g).

plaintiffs could have received an award of attorney's fees even if they had not prevailed, their attorneys did not truly run a risk of obtaining no compensation for their services in this action.

The Teamsters Plan's contention in this regard is tenable and finds some support in *Winpisinger v. Aurora Corp., supra,* an action brought by the trustees of a pension plan against certain classes of participants to have an amendment to the plan declared lawful. The court found that the amendment was unlawful and awarded attorney's fees to the defendants. However, the court rejected the defendants' argument that the amount of the award should have been increased to reflect its contingent nature. The court reasoned that ERISA "eliminates the contingency of no fees being awarded, even though counsel's client was unsuccessful, where the services rendered were beneficial or necessary to the administration of the pension fund." *Winpisinger v. Aurora Corp., supra,* at 786.

Nevertheless, I find that the reasoning of *Winpisinger* is not applicable in the present case. Defendants' attorneys in *Winpisinger* represented certain broad classes of participants in the plan. Moreover, the litigation involved the validity of an amendment to the terms of the plan. Thus, as the court indicated, the services rendered by the defendants' attorneys were beneficial or necessary to the administration of the plan. In the present case, however, plaintiffs are five individuals who have been improperly denied past service credit by the Teamsters Plan. Their claims do not involve any other individual participants or the actual terms of the Teamsters Plan. Therefore, unlike the defendants' attorneys in *Winpisinger,* plaintiffs' attorneys herein did not render services which directly relate to the administration of the pension plan.

In the circumstances of this case, it is highly questionable whether plaintiffs could have received an award of attorney's fees if they had not prevailed on the merits. Certainly, the Teamsters Plan has not cited, nor has my own research produced, any case which would support an award of fees in such a situation. Moreover, the factors elaborated in *Iron Workers Local No. 272 v. Bowen, supra, Eaves v. Penn, supra,* and *Ford v. New York Central Teamsters Pension Fund, supra,* suggests that if plaintiffs had not prevailed they would not have been entitled to an award of attorney's fees. For example, if plaintiffs had not succeeded on the merits, the Teamsters Plan probably could not be said to be sufficiently culpable to justify an award of attorney's fees. Similarly, if plaintiffs had not prevailed, the relative merits of the parties' positions would operate against rather than in favor of such an award in plaintiffs' behalf.[4] At the very least, if plaintiffs had not prevailed on the merits, the amount of fees awarded to them would have been reduced substantially from the lodestar figure.

Furthermore, increasing the amount of the attorney's fee award because plaintiffs' attorneys represented them on a contingency basis furthers the underlying purposes of 29 U.S.C. §1132(g). ERISA is a remedial statute and must be construed liberally in favor of the persons whom it was designed to protect. *Landro v. Glendenning Motorways, Inc., supra* note 1, at 1356. Although pension plan participants have an obvious economic incentive to pursue litigation if they have been wrongfully denied benefits, it is

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[4]Of course, I am not presented with and therefore do not directly address the question whether plaintiffs would be entitled to an award of attorney's fees if they did not prevail on the merits. Rather I merely hold that, because plaintiffs' attorneys did incur a significant risk that they would not receive any fees if plaintiffs did not succeed, the amount of fees awarded should be increased to reward them for incurring such risk.

very unlikely that these plaintiffs would have had the financial means to do so. Attorneys may be encouraged to make their services more widely available to pension claimants by accepting cases on a contingency basis if there is a possibility that they may receive an enhanced award of fees in the event that they ultimately prevail on the merits.

However, I reject plaintiffs' contention that the contingent nature of the fee award justifies doubling the lodestar figure. Instead, I find that an increase of fifty percent is sufficient to compensate plaintiffs' attorneys for assuming the risk that they might have received no fees in connection with this case. I am also unpersuaded by plaintiffs' argument that the other factors elaborated in *Johnson v. Georgia Highway Express, Inc., supra,* warrant a further increase in the amount of the award.

Therefore, I conclude that plaintiffs are entitled to an award of attorney's fees against the Teamsters Plan in the amount of $36,300.75. I also find that plaintiffs are entitled to recover costs and disbursements totalling $1,789.03 from the Teamsters Plan. No fees or costs shall be awarded against any of the other defendants.

Based on the foregoing discussion, plaintiffs' motion for an award of attorney's fees and costs against the Teamsters Plan is hereby Ordered granted in total the amount of $38,089.78. The Clerk is directed to enter judgment in accordance with this Memorandum and Order and my Findings of Fact, Conclusions of Law and Order entered March 15, 1982.

Dated: Buffalo, N. Y.
June 7, 1982

JOHN T. ELFVIN
U.S.D.J.